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THE
AMERICAN STATE REPORTS,

CONTAINING THE

CASES OF GENERAL VALUE AND AUTHORITY

**SUBSEQUENT TO THOSE CONTAINED IN THE "AMERICAN
DECISIONS" AND THE "AMERICAN REPORTS,"**

DECIDED IN THE

COURTS OF LAST RESORT

OF THE SEVERAL STATES.

SELECTED, REPORTED, AND ANNOTATED

By A. C. FREEMAN,
AND THE ASSOCIATE EDITORS OF THE "AMERICAN DECISIONS."

VOL. LXV.

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CASES
IN THE
SUPREME COURT
OF
WISCONSIN.

STATE v. SHOVE.

[96 WISCONSIN, 1.]

BANKS AND BANKING—RECEIPT ON DEPOSIT, WHAT IS.—If a certificate of deposit is issued by a bank for money received, payable in one year, with interest, and not subject to check, the money is received on deposit within the meaning of a statute making it a crime for an officer of a bank to accept or receive money on deposit if he knows, or has reason to know, that the bank is unsafe or insolvent.

BANKS AND BANKING—CRIMINAL RECEIPT OF DEPOSIT.—Although a portion of the money for which a certificate of deposit is issued by a bank consists of that represented by a prior certificate of deposit against the same bank and surrendered at the time that the last deposit is made, the last deposit and the certificate therefor must be treated as if the whole amount had been deposited in cash.

BANKS AND BANKING—TO PROVE THE INSOLVENCY OF A BANK at the time a deposit was made, evidence is admissible of the amount of deposits in the bank, including those for which certificates not yet due have been issued and of indebtedness due to the bank and its value as part of the assets.

Information against, and conviction of, the defendant for receiving a deposit of money contrary to the terms of a statute. On the trial, for the purpose of showing the insolvency of the depository at the time alleged in the information, the state was permitted to prove, over the objection and exception of the defendant, the amount of deposits in the bank, including those for which certificates had been issued, at that time, and the indebtedness of other people to the bank and the value of their commercial paper held by the bank as part of its assets.

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T. A. Gilman, B. M. Goldberg and C. W. Felker, for the appellant.

W. H. Mylrea, attorney general, J. L. Erdall, assistant attorney general, and A. J. Schmitz, assistant district attorney, for the state.

5 CASSODAY, C. J. The defendant was, at the time in question, the president, manager, director, and stockholder of the "T. C. Shove Banking Company." As such, he was convicted of having received on deposit April 11, 1892, the three hundred dollars mentioned, contrary to section 4541 of the Revised Statutes. Eliminating from 6 that section what is not applicable here, and it declares, in effect, that "any officer, director, stockholder, manager, or agent of any bank, who shall accept or receive on deposit, or for safekeeping, or to loan, from any person, any money, or any bills, notes, or other paper circulating as money, or any notes, drafts, bills of exchange, bank checks, or other commercial paper for safekeeping or for collection, when he knows, or has good reason to know, that such bank is unsafe or insolvent, shall be punished by imprisonment," et cetera. The constitutionality of this statute has been repeatedly sustained by this court, and its validity is not now challenged: *Baker v. State*, 54 Wis. 368; *In re Koetting*, 90 Wis. 166.

1. The principal contention of counsel for the defendant is to the effect that the certificate reciting that Hattie J. Glye had "deposited" in the bank three hundred dollars, payable one year from the date thereof, and then with interest, and not subject to check, made the transaction a loan, and not a deposit, and hence not within the condemnation of the statute. The argument is, that the bank simply borrowed the money and gave its promissory note therefor, due in one year from date, and therefore did not accept or receive the money on deposit, nor for safekeeping, nor to loan, nor for collection, within the meaning of the statute.

We assume that the bank had authority, as incident to its necessary powers to carry on such business, to issue such time certificates: *Sanborn and Berryman's Annotated Statutes*, sec. 2024, subsec. 21; *Rockwell v. Elkhorn Bank*, 13 Wis. 653; *Ballston Spa Bank v. Marine Bank*, 16 Wis. 120; *Curtis v. Leavitt*, 15 N. Y. 9, 295, subd. 5. In construing the statute in question, this court has, among other things, said: "The manifest object of the statute in question was to suppress the business of banking or

brokerage by any insolvent person, company, or corporation. It therefore inflicts punishment upon persons so engaged, knowing the fact. . . . A bank implies capital, ⁷ and capital invites confidence. A man holding himself out as a banker or broker thereby gives public proclamation that he has money, and property readily converted into money, in his possession and subject to his control, and for that reason he may be safely trusted. . . . For an insolvent banker, company, or corporation to continue the business of banking is to hold out assurances of responsibility and surplus capital where neither exists. To do so knowingly is to secure the confidence, and hence obtain the money, of the ignorant and unwary by an implied deception. It is the old story of securing the victim by a display of false colors. To suppress this mischief, to save the public from being induced to deposit money with such insolvent by the implied assurance of responsibility and wealth essential to the business, when they do not in fact exist, was the evident purpose of this statute": *Baker v. State*, 54 Wis. 376, 377. These views have been expressly sanctioned in *Meadowcroft v. People*, 163 Ill. 56; 54 Am. St. Rep. 447. Judge Jenkins has expressed similar views in *In re Cook*, 49 Fed. Rep. 842; *Cook v. Hart*, 146 U. S. 183. As said by Mr. Justice Winslow in a recent case: "The offense consists in receiving deposits in a bank in fact insolvent, and which the person receiving the deposit knew, or had good reason to know, was insolvent": *In re Koetting*, 90 Wis. 171.

Money deposited in a bank is, in law, a loan by the customer to the bank: *Sims v. Bond*, 2 Nev. & N. 608; 5 Barn. & Adol. 389. "All deposits made with bankers may be divided in two classes, namely, those in which the bank becomes bailee of the depositor, the title to the thing deposited remaining with the latter, and that other kind of deposit of money peculiar to banking business, in which the depositor, for his own convenience, parts with the title to his money, and loans it to the banker; and the latter, in consideration of the loan of the money and the right to use it for his own profit, agrees to refund the same amount, or any ⁸ part thereof, on demand": *Marine Bank v. Fulton Bank*, 2 Wall. 256. See, also, *Planters' Bank v. Union Bank*, 16 Wall. 483; *Oulton v. Savings Inst.*, 17 Wall. 109; *Commercial Bank v. Armstrong*, 148 U. S. 59. Ordinarily, the money so accepted or received by such bank or banker is accepted or received on deposit. In order to make the section broad enough to cover every case where money is so accepted or received by

a person so engaged in the business of banking when he knows, or has good reason to know, that such bank or banker is unsafe or insolvent, there were added to the words "on deposit" the words "or for safekeeping, or to loan," together with the other words mentioned, including the words "or for collection," as stated. The purpose of the section, therefore, seems to be to punish every person engaged in the business of banking who, knowing, or having good reason to know, that such bank or banker is unsafe or insolvent, nevertheless accepts or receives money in such business, either "on deposit, or for safekeeping, or to loan," or accepts or receives such paper "for collection." These four purposes accompanying such acceptance or receipt of money or commercial paper for collection would seem to be sufficiently broad and general to include every purpose for which the bank or banker could accept or receive money or commercial paper for collection. If making the certificate of deposit payable in one year takes the case out of the statute, then making such certificate payable in a month or a week or a single day would also take a case out of the statute. As short time certificates are, ordinarily, as acceptable to customers as certificates payable on demand, it is obvious that an insolvent banker or officer of an insolvent bank, with full knowledge of such insolvency, might, by issuing such time certificates, continue such business indefinitely, without committing the offense prescribed in the statute, unless it is construed so as to cover deposits upon which such time certificates are issued, as well as those payable ⁹ on demand. "Where the main object and intention of a statute are clear, it must not be reduced to a nullity by the draftman's unskilfulness or ignorance of the law, except in the case of necessity or the absolute intractability of the language used": *Salmon v. Duncombe*, L. R. 11 App. Cas. 627. "In construing statutes, the usual and proper mode is to ascertain the intention of the legislature from the language they have used, connected with the state of the law on the same subject anterior to the passage of the statute. When the courts know for what particular mischief the legislature intended to provide a remedy, it is their duty so to construe the statute as most effectually to suppress the mischief and advance the remedy": *Coster v. Lorillard*, 14 Wend. 297. "Even penal statutes are not to be construed so strictly as to defeat the obvious intention of the legislature": *United States v. Wiltberger*, 5 Wheat. 76; *Manitowoc Co. v. Truman*, 91 Wis. 12. See, also, *United States v. Freeman*, 3 How. 564, 565; *United States v. Saunders*, 22 Wall. 492. While a certifi-

cate of deposit payable at a fixed time in the future may technically be regarded as a loan and not a mere deposit, yet, in view of the obvious purpose of this statute, we are constrained to hold that the transaction in question was a deposit within the meaning of the statute.

2. The mere fact that a portion of the three hundred dollars consisted of a certificate of deposit held against the same bank, and the accrued interest thereon, which was surrendered at the time, did not make the transaction essentially different from what it would have been had the whole amount of three hundred dollars been deposited in cash, as recited in the certificate. The cash was present, or supposed to be present, in the bank, and was considered and treated the same as though the cashier had actually passed it over to Glye and she had immediately redeposited the same in the bank.

3. We perceive no error in the method of proving the insolvency of the bank at the time of receiving the money and ¹⁰ issuing the certificate of deposit in question; and that is so whether by such insolvency is meant inability to pay its debts in the ordinary course of business, or merely inability to pay in full at some future time, upon ultimately winding up its affairs. The evidence was certainly material, and relevant and pertinent to the issue on trial, and hence competent.

By the Court. The several exceptions certified to this court pursuant to section 4720 of the Revised Statutes are each and all overruled.

FRAUDULENT BANKING—WHAT IS—REMEDY OF DEPOSITOR.—To permit a deposit in a bank in reliance upon its supposed solvency is a gross fraud if its officers know at the time of its insolvency, and the depositor is entitled to reclaim the deposit or the proceeds: *Grant v. Walsh*, 145 N. Y. 502; 45 Am. St. Rep. 626, and note. See *State v. Elfert*, 102 Iowa, 188; 63 Am. St. Rep. 433, and note. Where a deposit has been kept separate and fully received before formal insolvency, the depositor may claim it: *American Exchange Bank v. Loretta etc. Co.*, 165 Ill. 103; 56 Am. St. Rep. 233. It is criminal negligence for a banker not to know his own insolvency: *Meadowcraft v. People*, 163 Ill. 56; 54 Am. St. Rep. 447; and it has been held that the directors of a bank are conclusively presumed to know its condition: *Tate v. Bates*, 118 N. O. 287; 54 Am. St. Rep. 719. See *Solomon v. Bates*, 118 N. O. 311; 54 Am. St. Rep. 725.

FARWELL COMPANY v. WOLF.

[96 WISCONSIN, 10.]

CORPORATIONS—ACTS ULTRA VIRES.—A corporation organized for the purpose of carrying on a general dry goods business does not possess the power to acquire by assignment claims of others for damages growing out of an alleged conspiracy to defraud, but in no way connected with its affairs, and not necessary to preserve its property or protect its interests.

CORPORATIONS—ACTS ULTRA VIRES—DEFENSES.—Although the act of a corporation in acquiring a cause of action is ultra vires, yet want of corporate power to engage in such business cannot be interposed as a defense when the corporation seeks to enforce such cause of action.

ASSIGNMENTS.—A CAUSE OF ACTION FOR DAMAGES arising from a conspiracy to defraud, by purchasing and selling goods without paying for them, is not a cause for damages done to personal property, and hence is not assignable.

CONSPIRACY TO DEFRAUD—MEASURE OF DAMAGES. In an action to recover damages for a conspiracy to defraud by purchasing and selling goods without paying for them, the measure of damage is the value of the goods at the place where, and the time when, they were obtained from the plaintiff, with interest from such time, at the legal rate.

APPELLATE PRACTICE.—ERROR NOT PREJUDICIAL cannot work a reversal of the judgment.

Action to recover damages for a conspiracy to defraud. In 1893, defendants entered into a conspiracy to defraud wholesale dealers in goods, wares, and merchandise by purchasing goods on credit, without intending to pay for them, and by having them delivered at the store of one Josephson; who was to sell them and divide the proceeds among the co-conspirators. This scheme was carried out, and large amounts of goods were purchased on credit from the plaintiff and numerous other dealers, who were not paid for their goods. Before the commencement of this action, such dealers, for a valuable consideration, sold and assigned to plaintiff their respective claims for the goods sold, together with their respective causes of action for damages against the defendants on account of such conspiracy. Judgment for plaintiff on all of the claims. Defendants appealed.

Blum & Blum and J. M. Morrow, for the appellants.

Lewis & Briggs and J. J. Hughes, for the respondent.

¹³ MARSHALL, J. The record shows that plaintiff is a corporation organized for the purpose of carrying on a general dry goods business. The point was raised on the trial, and preserved for review, that it did not possess power to acquire by assignment claims for damages in no way connected with its own af-

fairs, growing out of the alleged conspiracy to defraud. It does not appear that such claims were in any way necessary to the preservation or enforcement of plaintiff's original claim, or that such purchase was to effect in any way the purposes of its organization, so as to bring its action in that regard within the rules that a corporation may, to preserve its own property and protect its legitimate interests, acquire and enforce liens which would otherwise be outside of the purposes of its organization. A corporation has only such powers as its organic act, charter, or articles of organization confer. This is elementary, but it includes such powers as are reasonably necessary to effect all the general purposes of the corporate creation, though not particularly specified in its charter, unless prohibited thereby or by some law of the state. From the foregoing, without further discussion, we must hold that plaintiff had no authority to acquire by purchase the various claims for damages on which a recovery was had. But it by no means follows that its want of power can be taken advantage of by the defendants in this action. Formerly, want of corporate power was an effective weapon, both for defense and attack, in the hands of private parties; but, without any change whatever respecting the general doctrine of ultra vires as applied to the acts of corporations acting outside the purposes of their creation, there has been ¹⁴ a gradual development in the direction of holding that none but a person directly interested in the corporation, or the state, can question such authority. Such development from the rigorous rule which anciently obtained was manifested earliest in the adoption of the rule that, where a corporation has violated its charter in the purchase and acquirement of real estate, its title thereto and right to enjoy the same cannot be inquired into collaterally in actions between private parties or between the corporation and private parties—that it can be questioned only by the state: *Natoma etc. Co. v. Clarkin*, 14 Cal. 544; *Alexander v. Tolleston Club*, 110 Ill. 65; *Fritts v. Palmer*, 132 U. S. 282; *Runyan v. Coster*, 14 Pet. 122; *National Bank v. Whiting*, 103 U. S. 99; *Shewalter v. Pirner*, 55 Mo. 218; *Ragan v. McElroy*, 98 Mo. 349; *National Bank v. Matthews*, 98 U. S. 621. In the latter case, the supreme court of the United States, reversing the supreme court of the state of Missouri, laid down the rule that, “where a corporation is incompetent by its charter to take a title to real estate, a conveyance to it is not void, but only voidable, and the sovereign alone can object”; that “it is valid until assailed by a direct proceeding instituted for that purpose” by the government; and, further, in

effect, that the danger of a judgment of ouster and dissolution is the only check to prevent and punish violations of corporate charters. If the question were respecting the right of a private person to challenge corporate action concerning the acquirement or enjoyment of lands without authority in the charter so to do, it would be deemed so well settled that no such right exists as not to be open to serious discussion; but whether the same rule governs generally is not so clear.

An extended discussion of the subject, showing the process of development in the application of such rule, would be interesting and instructive, but not necessary for the purposes of this opinion. Therefore, we content ourselves with referring to a few well-considered cases, showing the present ¹⁵ state of the law respecting the subject, which Thompson, in his work on Corporations, very properly refers to as a "new and growing doctrine." In *Prescott Nat. Bank v. Butler*, 157 Mass. 548, an action between the bank and a private person, the question was raised of whether the action of the former in purchasing notes in the open market as a commodity was ultra vires; and in respect thereto the court said, in effect, that if such a purchase be ultra vires, it is not made penal or expressly prohibited; therefore the violation of law could be remedied only in proceedings against the bank, in the name of the state, to deprive it of its charter. In *Grant v. Henry Clay etc. Co.*, 80 Pa. St. 208, where the question was whether the corporation could purchase or hold leases of mining lands, the court, in deciding such question, said, in effect, that if the commonwealth is interested in such an inquiry, it must be made by the proper officer; that the question was of a public nature, concerning solely the sovereignty of the state, and not one that in any way concerned private parties. In *Martindale v. Kansas City etc. R. R. Co.*, 60 Mo. 508, the question was whether the defendant had violated statutory requirements, and the court laid down the broad doctrine that collateral inquiry by a private citizen into the supposed illegal acts of a corporation is not permitted in any case, unless expressly so provided by statute. To the same effect are *Kinealy v. St. Louis etc. R. R. Co.*, 69 Mo. 658, and *Hovelman v. Kansas City etc. Co.*, 79 Mo. 632. In *Baker v. North Western etc. Loan Co.*, 36 Minn. 185, the question was, whether the purchase and enforcement of certain mortgage liens was in excess of the corporate authority. Held, that none but the state or a stockholder could raise the question.

If the position that the principle under discussion is now,

in most jurisdictions, recognized as one of general application, except in respect to contracts wholly executory, required further support, resort might be had to many other ¹⁶ adjudications of the highest respectability, though authorities there are which still adhere to the old rule that a corporate act in excess of its power, either because outside of the purposes of the corporation or because prohibited by statute, is ultra vires, and cannot be enforced in any action in any court of justice, without regard to whether such act be challenged by the public or by a private person. Such authorities are exceptional. Judge Thompson, in his valuable treatise on the Law of Corporations, volume 5, sections 6033-6038, commenting on the subject, appears to deprecate the prevalence of the "new doctrine," and to argue against its further extension, upon the ground that it practically destroys the effect of the doctrine of ultra vires, as applied to the unauthorized exercise of corporate power; but the learned author is manifestly in error in that respect. Such doctrine, notwithstanding the limitation which modern development has placed on the means by which it may be called into use, still exists, and may and will continue to exist, adapted as fully as ever to restrain the abuse of corporate franchises and authority, and to punish such abuse whenever the state, in its sovereign capacity, sees fit to exercise it. That such doctrine cannot be resorted to as a weapon for attack and defense in the hands of mere private persons, and used as a ready means of embarrassing business operations by and with corporate bodies, which directly or indirectly touch and administer to human desires at every turn of the individual in modern life, while its effectiveness for all essential purposes of restraint and punishment is fully preserved, furnishes no cause for regret, but rather cause for gratification at the evidence of how certainly principles, by natural growth and development, adapt the law and its administration to the ever-changing needs of advancing civilization, so as best to promote justice and the common welfare. When a corporation offends against the law of its creation, such offense is against the sovereignty of the state; ¹⁷ hence it is most proper that the state should apply the remedy and be charged with the sole responsibility in that regard, and such is the law by the trend of modern authorities, which we approve. This does not hold but that a person directly interested as a stockholder may, in a proper case, interfere, or but that the court may refuse on its own motion, or the objection of a private person, to aid a corporation to enforce, or protect it from the effect of, a contract wholly ex-

ecutory, when outside the purposes of the corporate organization.

In accordance with the foregoing, we hold that if a corporation purchases, pays for, and takes an assignment of a cause of action respecting matters outside the purposes of its creation and not authorized by its charter, in any action to enforce such cause of action want of corporate power to engage in such business cannot be interposed as a defense.

The further point is made that the several alleged assigned claims for damages were not assignable; therefore, that the recovery thereon cannot be sustained. Applying the usual test of assignability—that is, whether the claims are such as survive to the personal representatives—we start with the presumption that it will not be seriously contended that such claims survive at common law. To be sure, counsel cite various adjudications to show that claims for injuries to personal property do so survive, but they have no application to this case. This is not a claim for injury to personal property as such. At most, it is only an injury to a property right. *Webber v. Quaw*, 46 Wis. 118, and *McArthur v. Green Bay etc. Canal Co.*, 34 Wis. 139, are confidently referred to, but they are cases of injuries to property, strictly so called, and follow the New York authorities respecting the assignability of such claims.

In most states, as here, there is a statutory extension of the common-law rules, and authorities are very numerous respecting the subject, many of which, however, have very ¹⁸ little application to this case because of statutory differences. The New York statute provides that “actions for all wrongs done to the property rights or interests of another shall survive.” It is held that this language is so broad and comprehensive as to cover all injuries to rights of property, and is not confined to injuries to property as such—that it includes actions for damages for conspiracies to defraud and damages for deceit: *Bond v. Smith*, 4 Hun, 48; *Haight v. Hayt*, 19 N. Y. 464; *Lyon v. Park*, 111 N. Y. 350; *Brackett v. Griswold*, 103 N. Y. 425. These cases turned entirely on the meaning of the significant words, “property rights and interests.” Our own statute (Rev. Stats., sec. 4253), so far as it relates to this subject, is as follows: “Actions for damages done to real and personal estates” shall survive. A similar statute existed in Massachusetts at a very early day, and was adopted from that state by Michigan and this state as well. It received construction in the state of its origin, before adoption here; hence, under a familiar rule, such construc-

tion was, in effect, a part of the statute itself at the time it was ingrafted upon and became a part of our system. The whole subject goes back to the Statute of 4 Edward III, chapter 7. Before that, in England, no action for an injury to personal property survived. By such statute, says Mr. Justice Putnam, in effect, in *Holmes v. Moore*, 5 Pick. 257, an action for goods carried away survived, and by equitable construction it was held that the remedy for a wrong done to personal property, though such property was not actually carried away, survived, and such statute, with such construction, was adopted by the state of Massachusetts from the English statute. Following *Holmes v. Moore*, 5 Pick. 257, in *Read v. Hatch*, 19 Pick. 47, an action for damages for inducing plaintiff, by fraudulent representations respecting the insolvency of another, to sell property to such other, Shaw, C. J., in delivering the opinion of the court, said, in effect, that a fraud injuriously affecting a person's estate is not an injury to such person's personal estate, ¹⁹ within the meaning of the statute; that to hold otherwise would be to give to the statute a forced construction; and not conformable to the intent of its framers; that to uphold such construction would, in effect, be to say that every injury by which one may be prevented from pecuniary gain or subjected to pecuniary loss would, directly or indirectly, be a damage to his personal property. The statute must have a more limited construction, and be confined to damages done to some specific personal estate of which one may be the owner. The mere fraud or cheat by which one sustains a pecuniary loss cannot be regarded as damage done to personal estate. The construction thus given to the statute has never been departed from: See *Cutting v. Tower*, 14 Gray, 183; *Leggate v. Moulton*, 115 Mass. 552; *Brush v. Sweet*, 38 Mich. 574; *Dayton v. Fargo*, 45 Mich. 153.

The only case previously decided in this court that throws any light on the subject is *Murray v. Buell*, 76 Wis. 657, 20 Am. St. Rep. 92, cited by respondent. Though it is in harmony with the foregoing, it did not involve the precise question under discussion. The contention there appears to have been that an action for damages for a conspiracy to injure another's business was assignable as an injury to the person of such other. This court held that it could not be so considered, but was an injury to such other's business interest merely; therefore not assignable. It did not occur to the able counsel who presented the case in this court, or to the present chief justice, who wrote the opinion, that such a cause of action could be held assignable as an injury to

personal estate. Therefore the subject was not discussed, though to say, as was in substance said in such opinion, that such a cause of action is for an injury to business interests, therefore not assignable, is quite equivalent to saying that it is an injury to property rights, as distinguished from an injury to specific property, therefore not assignable.

The result of what has been said is, that the several assigned ²⁰ claims for damages, upon which the plaintiff recovered, did not pass to plaintiff by the attempted assignment thereof, and that such recovery cannot be sustained.

The point is made, based on several exceptions, that the familiar rule that statements made by one conspirator after the abandonment or completion of the conspiracy are not admissible against his coconspirators, was several times violated during the trial. It is needless to refer to each of such exceptions in detail. Suffice it to say that all have received careful examination without discovering any such violation.

The further point is made that the evidence is insufficient to sustain the finding of the jury respecting the existence of the alleged conspiracy to defraud. We are unable to sustain such contention. There appears to be considerable evidence, circumstantial and otherwise, on the question, from which the jury might legitimately have come to the conclusion which they did; hence we are unable to say that there was any abuse of discretion on the part of the trial judge in denying the motion to set aside the verdict as against the evidence.

The jury was instructed that the measure of plaintiff's recovery, in case of a finding in his favor, should be "the contract price of the goods sold, together with interest from the time of the commencement of the action." That was error. The true rule in such cases is the value of the goods at the place where, and time when, they were obtained from the plaintiff, with interest thereon from such time at the rate of six per cent per annum. Nevertheless an examination of the record shows that there was no contest on the question of the amount of damages sustained. All the evidence shows that the goods were worth the contract price. The court would have been warranted in instructing the jury, if they found in plaintiff's favor, to assess its damages at a sum equal to the cost price of the goods, with interest. Therefore the error of the court was not prejudicial; hence, in accordance ²⁰ with a familiar rule, it cannot work a reversal of the judgment.

Some other errors were assigned and discussed in the briefs of

counsel, all of which have been considered, but none appear to constitute reversible error, or are of sufficient importance to require special mention in this opinion.

The result of the foregoing is that plaintiff was not entitled to recover on any claim for damages other than that caused by its sale of goods to Josephson on and prior to the sixteenth day of September, 1893, amounting in value to four hundred and thirty-four dollars and eighty-three cents. Therefore, a new trial must be had, unless plaintiff consents to take judgment for such amount, with interest and costs.

By the Court. The judgment of the circuit court is reversed, and the cause remanded for a new trial, unless plaintiff elects to take judgment for four hundred and thirty-four dollars and eighty-three cents and legal interest thereon from the sixteenth day of September, 1893, together with the costs of the trial heretofore taxed in the circuit court.

CORPORATIONS—POWERS—ACTS ULTRA VIRES—Corporations possess only those powers or properties which the charters of their creation confer upon them, either expressly, or as incidental to their existence: *Leep v. St. Louis etc. Ry. Co.*, 58 Ark. 407; 41 Am. St. Rep. 109; and note. A business corporation cannot exercise abnormal and extraordinary powers to carry out its purpose: *Northside Ry. Co. v. Worthington*, 88 Tex. 562; 53 Am. St. Rep. 778, and note. Contracts of corporations are ultra vires when they involve adventures or undertakings outside and not within the scope of the powers given by their charters: *Jemison v. Citizen's Sav. Bank*, 122 N. Y. 135; 19 Am. St. Rep. 482, and note. The plea of ultra vires should not prevail, as a general rule, whether interposed for or against a corporation, when it does not advance justice, but accomplishes a legal wrong: *Kadish v. Garden City etc. Bldg. Assn.*, 151 Ill. 531; 42 Am. St. Rep. 256, and note; *Carson City Sav. Bank v. Carson City Elevator Co.*, 90 Mich. 550; 30 Am. St. Rep. 454, and note.

ASSIGNMENT OF CAUSE OF ACTION.—An assignment of the right to complain of fraud committed on the assignor is contrary to public policy and void: *Sanborn v. Doe*, 92 Cal. 152; 27 Am. St. Rep. 101, and note. An assignment cannot be made of the right to recover damages for a conspiracy to monopolize the coal business of a city, and to drive the assignor out of such business, either at the common law nor under a statute authorizing the assignment of causes of action for assault and battery, or false imprisonment, or other damages to the person: *Murray v. Buell*, 76 Wis. 657; 20 Am. St. Rep. 92, and note.

APPEAL—ERROR WITHOUT PREJUDICE.—Error without prejudice is no ground for a reversal of judgment: *Joseph v. Smith*, 39 Neb. 259; 42 Am. St. Rep. 571, and note; *Genz v. State*, 59 N. J. L. 488; 59 Am. St. Rep. 619; *Stewart v. State*, 35 Tex. Crim. Rep. 174; 60 Am. St. Rep. 35.

SMITH v. YOUMANS.

[96 WISCONSIN, 108.]

WATERS AND WATER COURSES — PRESCRIPTIVE RIGHTS.—The artificial state or condition of flowing water founded upon prescription becomes a substitute for the natural condition previously existing; and from it arises a right on the part of those interested to have the new condition maintained.

RIPARIAN RIGHTS—DAM RAISING WATER IN LAKE, LOSS OF RIGHT TO REMOVE.—The owners on the shore of a lake kept above the natural level by means of a dam until the owner thereof has acquired a prescriptive right to maintain it, and until the lands of such owners have become valuable as summer resorts by reason thereof, while they have made valuable improvements relying on the continued maintenance of the dam, have an easement on their part, and may prevent the owner of the dam from lowering the level of the lake to their injury.

RIPARIAN RIGHTS—RIGHT TO ABANDON EASEMENT.—An owner may abandon his water rights and easement to maintain a lake at an artificial level, so as to escape all liability at law, for consequential damages to riparian owners around the lake, unless he is bound by law or agreement to maintain the higher level of the waters of the lake.

LANDLORD AND TENANT.—Lessees of water power and a dam, who have another dam lower down the stream, have no other or greater rights in respect to the accumulation of water, or lowering the level of the water, than their lessor possesses.

Action to restrain the owner of a dam and his lessee from lowering the level of the water in a certain lake. Judgment for plaintiffs. Defendants appealed.

Ryan & Merton and T. W. Haight, for the appellants.

C. Quarles, Quarles, Spence & Quarles, and D. S. Tullar, for the respondents.

¹⁰⁸ PINNEY, J. It clearly appears that H. A. Youmans, the lessor of the defendant Howitt, and ancestor through whom the other defendants derived their rights to the mill power and water rights and privileges in question, acquired a right by prescription, or an easement, to maintain the waters of ¹⁰⁹ Lake Beulah at the level to which they were finally raised, and at which they had been maintained for a period of over forty years, and consequently to set the waters of the lake back against and over and upon the lands of the riparian proprietors, the plaintiffs and others, on the lake, for the purpose of creating and maintaining the necessary power for propelling a gristmill. His millsite, dam, and appurtenances constituted the dominant estate, and the right which he acquired was an easement in the one estate, and a servitude upon the estates of other riparian owners: Wash-

burn on Easements, 5. It seems to be a fair inference that such riparian owners, in view of the advantages that might or would accrue to them by raising the level of the waters of the lake by the dam in question, were induced to consent or acquiesce therein, and in the user of the dam and waters of the lake by Young and his predecessor in interest until their acts had ripened into an easement by prescription. The relative relations and interests of the parties which have thus originated, grown up, and become fixed by prescription, would seem to impose upon the parties reciprocal rights and duties, at least to the extent that, so long as such relative rights exist and are asserted, each party is bound in equity to abstain from doing anything to the prejudice of the other's rights, founded upon the relations thus created between them, and that they are equitably bound to deal fairly, reasonably, and justly with each other in respect thereto.

It has long been settled that the artificial state or condition of flowing water, founded upon prescription, becomes a substitute for the natural condition previously existing, and from which a right arises on the part of those interested to have the new condition maintained. The watercourse, though artificial, may have originated under such circumstances as to give rise to all the rights that riparian proprietors have in a natural and permanent stream, or have been so long used as to become a natural watercourse prescriptively; and ¹¹⁰ "when a riparian owner has diverted the water into an artificial channel, and continued such change for more than twenty years, he cannot restore it to its natural channel, to the injury of other proprietors along such channel, who have erected works or cultivated their lands with reference to the changed condition of the stream, or to the injury of those upon the artificial watercourse who have acquired by long user the right to enjoy the water there flowing": Gould on Waters, sec. 225, and cases there cited. It is upon this ground that when the natural outlet of Lake Beulah was closed, and so remained for over twenty years, the artificial outlet at that time opened, and since maintained during that period, became the natural outlet, with all its legal incidents and consequences. In *Belknap v. Trimble*, 3 Paige, 577, 605, it was held "that the rule must be reciprocal; that the proprietor of land at the head of a stream, who changes the natural flow of water, and has continued such change for twenty years, cannot afterward be permitted to restore the flow of water to its natural state, when it will have the effect to destroy the mills of other proprietors, which have been erected in reference to such change

in the natural flow of the stream": Washburn on Easements, *313-315. In Mathewson v. Hoffman, 77 Mich. 421, 434, the rule thus stated in Belknap v. Trimble, 3 Paige, 447, was approved: Lampman v. Milks, 21 N. Y. 505; Roberts v. Roberts, 55 N. Y. 275. It is also supported by Delaney v. Boston, 2 Har. (Del.) 489-491; Middleton v. Gregorie, 2 Rich. 631-637. In Washburn on Easements, *313-315, the learned author lays it down that "where one who owns a watercourse in which another is interested, or by the use of which another is affected, does or suffers acts to be done affecting the rights of other proprietors, whereby a state of things is created which he cannot change without materially injuring another who has been led to act by what he himself had done or permitted, the courts often apply the doctrine of estoppel; and equity, ¹¹¹ and sometimes law, will interpose to prevent his causing such change to be made." In Woodbury v. Short, 17 Vt. 387, 44 Am. Dec. 344, it was held that, where a diversion of the stream affects other proprietors favorably, and the party on whose land the diversion is made acquiesces in the stream running in the new channel for so long a time that new rights may be presumed to have accrued, or have accrued, in faith of the new state of the stream, the party is bound by said acquiescence, and cannot return the stream to the former channel: Ford v. Whitlock, 27 Vt. 265; Norton v. Volentine, 14 Vt. 246; 39 Am. Dec. 220.

These cases relate, it is true, to diversions of water in running streams, but we are unable to perceive any reason why the same principle is not equally applicable to changes made in the level of a lake or pond, where, by means of a dam, the natural level has been raised for hydraulic purposes. The maintenance of the higher level of waters in the lake for the period of prescription secured to the owners of the millsite an easement in their favor to keep up the water to the necessary level to furnish water power for their mill. So, on the other hand, the riparian owners above have enjoyed, without question or interruption, for the same period of time, the advantages resulting from the flooding and submersion of their lands, by which the depth of water in the lake was greatly increased, and low, boggy, swampy, and unsightly lands were flooded, so that the waters extended to the high banks, whereby their access to and from the lake was improved, and the adjacent lands, with the resulting amenities and advantages, have been rendered extremely desirable for the particular use for which they have been improved at great cost and expense, namely, for summer resorts, relying upon the continued

level of the water in the lake without change, without which they would be deprived of the greater portion of their present value. May it not be justly said that the respective tenements or estates, by the acts of their respective owners, have become each dominant, and each ¹¹² servient to the other in respect to the respective easements and advantages thus acquired by them, and enjoyed during the usual prescriptive period?

In the case of Cedar Lake Hotel Co. v. Cedar Creek Hydraulic Co., 79 Wis. 297, this court held that one who owns land on the shores of an inland lake, which is valuable for use as a pleasure resort on account of its proximity thereto and the easy access to its waters for boating and fishing, can maintain an action to restrain other riparian proprietors from so drawing off the waters of the lake as to lower its level, and leave a wide margin of bog, covered with decaying vegetation, along its shores, making it repulsive in appearance and unhealthy in effect, and thus injurious to the plaintiff's property; and this was so held in view of the relative rights and duties of the riparian proprietors, and not because of the restrictive grant of power to the corporation, one of the defendants. It is true that this was held in relation to an attempted change in the natural level of Cedar lake, but the conclusion seems irresistible that the increased level of the lake, in view of the facts found by parity of reasoning from the adjudged cases referred to in relation to streams, must be esteemed as having the legal incidents of the natural level; certainly so long as the defendants retain and insist upon their easement to keep and maintain the dam at a height to keep up such new level in the lake. They have not and do not propose to abandon or surrender this easement. They are certainly bound to exercise their rights in a fair and reasonable manner, and as they had been accustomed to do, and not capriciously or wantonly, so as to prejudice the existing rights and interests of the plaintiffs as riparian owners. The judgment of the circuit court is in accordance, we think, with sound principles, and the doctrines recognized and enforced in such and similar cases in courts of equity.

We have no doubt but that the defendants may abandon their water rights and easements, so as to escape all liability ¹¹³ at law for consequent damages, if they are not bound by law or agreement to maintain the higher level of the waters in the lake. It was held in *Mason v. Shrewsbury etc. Ry. Co.*, L. R. 6 Q. B. 578, that the owners of the servient estate could acquire, by the mere existence of the easement, no right, as against the owner

of the dominant tenement, to the continuance of its use and exercise, as in the case of an easement for diversion of water; that he had the right to abandon the exercise and use of his easement, as it was not compulsory. But here, as stated, there has been no abandonment or surrender, and the case must be determined upon the equitable grounds arising out of the special facts found by the trial court.

2. As to the defendant Howitt, it is necessary only to observe that he stands, in respect to his lease, in the same plight and condition of his lessor, and with no other or greater rights. He has no right, under the lease, to use the dam, bulkhead, et cetera, as a reservoir to accumulate water in a manner not permissible to his lessor, or to accumulate and hold water for his mill on the stream below, in order to discharge it irregularly and in great volumes, as may suit his convenience, thus drawing down wholly, or in great part, the waters of the lake to the level of the flume. As a riparian owner on Mukwanago creek below, he has no such right, but is entitled only to the accustomed flow of the water as it had been wont to run, without material alteration or diminution, to his mill on the stream below (*Kimberly etc. Co. v. Hewitt*, 79 Wis. 334), all of which he obtains by the flow of the water over the dam or waste gates.

For these reasons we think that the judgment of the circuit court is correct.

By the Court. The judgment of the circuit court is affirmed.

WATERS—RIPARIAN RIGHTS—LIABILITY OF OWNERS OF DAMS.—The right to the use of water in a particular manner is acquired by the uninterrupted adverse enjoyment of such use for over twenty years. *Pillsbury v. Moore*, 44 Me. 154; 69 Am. Dec. 91. The owner of a dam must so govern and control it that injury will not result to his neighbors: *Fraser v. Sears Union Water Co.*, 12 Cal. 555; 73 Am. Dec. 562. A lower proprietor cannot raise any dam or other work to prevent the enjoyment, by the upper proprietor, of a servitude which exists in favor of his estate, notwithstanding the fact of an aggravation of the servitude: *Barrow v. Landry*, 15 La. Ann. 681; 77 Am. Dec. 199. As to the rights and liabilities of owners of dams, see monographic note to *McCoy v. Danley*, 57 Am. Dec. 684-693.

WATERS—ABANDONMENT OF WATER RIGHT.—A water right may be abandoned or lost: Note to *Wilmer v. Simmons*, 50 Am. St. Rep. 700, 701. Such abandonment is a matter of intention, and, to constitute abandonment, there must be an intent to abandon: Note to *Wilmer v. Simmons*, 50 Am. St. Rep. 700.

SCHIFFLER v. CHICAGO AND NORTHWESTERN RAILWAY COMPANY.

[96 WISCONSIN, 141.]

RAILROADS—PASSENGERS—DUTY TO STOP AT STATION NOT SCHEDULED.—A passenger, whether with or without a ticket, must ascertain before boarding a railroad train whether it stops at the station of his destination. If he fails to do so, the railroad company is under no obligation to stop at such station, contrary to its published schedule.

RAILROADS—POWER OF CONDUCTOR.—It is not within the apparent power of the conductor of a railway passenger train to bind the company by a promise to change the published schedule of stops to be made by his train.

RAILROADS—CONTRIBUTORY NEGLIGENCE OF PASSENGER.—A boy, seventeen years of age, of ordinary intelligence, who has made previous railroad journeys alone, must be held to assume the risk of jumping from a moving train at a station at which the train is not scheduled to stop, although the conductor promised to slow up the train for him and he jumped under the impression that the promise was being kept.

NEGLIGENCE—PROXIMATE CAUSE.—The act of a passenger in jumping from a train while it is in rapid motion is neither the natural nor the probable consequence of a failure to stop the train according to promise. Hence, such failure is not the proximate cause of injury to the passenger arising from the jump.

Timlin & Glicksman and E. A. Conway, for the appellant.

Fish & Cary, for the respondent.

¹⁴⁵ **NEWMAN, J.** In order to state a cause of action against the defendant, the complaint must allege such facts as show that the defendant failed in the performance of some duty which it owed to the plaintiff, and that such neglect of duty caused the plaintiff's accident. It is claimed that, under the circumstances, the defendant owed to the plaintiff the duty to stop its train at Jackson, so as to permit him to alight there. But the plaintiff's presence upon the train without a ticket, and in ignorance of the regulation which prevented it to stop at Jackson, was not through any fault or inadvertence of the defendant. By inquiry at the station before entering upon the train, he would have learned of the regulation. It was his duty to ascertain this for himself, and to regulate his conduct accordingly. Even if he had bought a ticket at the station, that would not have put upon the defendant the duty to stop its train at Jackson contrary to its published schedule arrangements: *Plott v. Chicago etc. Ry. Co.*, 63 Wis. 511. When he received the information that ¹⁴⁶ the train would not stop at Jackson, it was too late to prevent a predicament. The train had left the station, and had entered upon its sched-

uled and advertised journey. Without important reason, it should not be hindered or delayed. The conductor's duty, in the circumstances, was not doubtful. On payment of the proper fare, it was to carry the plaintiff to such station near to Jackson as the plaintiff should choose, and at which the train was scheduled to stop. It was, no doubt, the conductor's duty to run the train according to the published schedule, and he had no power to bind the company by any change from such schedule. Nor was it within his apparent power to make such change. So the plaintiff had no right to infer that the conductor had any power to bind the company by a promise to stop or slow up at Jackson: *Plott v. Chicago etc. Ry. Co.*, 63 Wis. 511. From these considerations, it is plain that the defendant owed to the plaintiff no duty to stop the train at Jackson. So the failure to stop the train was no wrong of which he can complain.

The only wrong which is plainly alleged in the complaint is the conductor's promise to slow up the train. The promise was one which he had no right either to make or to keep. It does not plainly appear whether he in fact kept the promise. It does appear that the train was somewhat slowed up. The plaintiff thought the promise was being kept. After he had been carried some distance by the station, and when it did not appear to be slowing up any more, he jumped. No one advised him that it was safe to jump. No one knew that he was about to jump. He jumped on his own judgment that it was safe to do so. It was certainly a rash act, and its consequence to the plaintiff was serious. Nothing but his minority could relieve the plaintiff from responsibility for the act. If he had been four years older, there could be no question that he assumed and must bear the consequences of the act. But he was only seventeen years old. So great discretion cannot be required of him as if he had ¹⁴⁷ been twenty-one years old. But it is required of him that he exercise such a degree of judgment and prudence as is ordinarily exercised by persons of similar age, experience, and intelligence. It does not appear that he was not a boy of ordinary intelligence. He lived in Milwaukee. He had on several occasions made journeys by railroad alone. He was not of such immature years as to be relieved from all responsibility for prudent conduct. His experience was such as to acquaint him with the fact that there was danger in jumping from a moving train. It must be held that he jumped at his own risk.

Even if this were not so, it is not easy to apprehend how the failure to stop the train could be the proximate cause of the

plaintiff's accident. The natural consequence would be that plaintiff would be carried by the station. If this was a breach of a binding contract of carriage, it would furnish ground for appropriate damages. But that the plaintiff should jump from the train while in rapid motion was neither a natural nor probable consequence of the failure to stop the train. And so it could not well be anticipated. For that reason, it was not the proximate cause of the plaintiff's accident: *Block v. Milwaukee Street Ry. Co.*, 89 Wis. 371; 46 Am. St. Rep. 849.

By the Court. The order of the superior court of Milwaukee county is affirmed.

Winslow, J., dissents.

RAILROAD COMPANIES—RIGHT TO REGULATE STOPS—DUTY OF PASSENGER.—A railroad company has the right, in the absence of statutory requirements, to determine for itself what trains shall stop at particular way stations. The traveling public is bound to accommodate itself to such regulations as may have been adopted: *Sira v. Wabash R. R. Co.*, 115 Mo. 127; 37 Am. St. Rep. 386, and note. A railroad passenger must inform himself whether a train stops at a station. It is the duty of a person about to take passage on a railroad train to inform himself when, where, and how he can go or stop according to the regulations of the company: *Atchison etc. R. R. Co. v. Gants*, 28 Kan. 608; 5 Am. St. Rep. 780; *Dwinelle v. New York etc. R. R. Co.*, 120 N. Y. 117; 17 Am. St. Rep. 611.

RAILROAD COMPANIES—NEGLIGENCE OF PASSENGER CONTRIBUTING TO HIS INJURY.—Generally, passengers cannot recover if they voluntarily assume a position of peril from which injury results to them: *Jammison v. Chesapeake etc. Ry. Co.*, 92 Va. 327; 53 Am. St. Rep. 813, and note. But it is negligent and unwarrantable conduct on the part of the conductor of a train to advise a passenger to leave a moving train: *Note to Evansville etc. R. R. Co. v. Athon*, 51 Am. St. Rep. 310; note to *Irish v. Northern Pac. R. R. Co.*, 31 Am. St. Rep. 904. But while a railroad company is bound to stop its train at the station to which it has contracted to carry a passenger, and to land him safely and conveniently, the fact that the train is about to pass such station without stopping does not justify the passenger in jumping from the moving train, unless expressly or impliedly invited to do so by the company: *Walker v. Vicksburg etc. R. R. Co.*, 41 La. Ann. 795; 17 Am. St. Rep. 417, and monographic note. See monographic note to *Ingalls v. Bills*, 43 Am. Dec. 364, 365; *Chicago etc. R. R. Co. v. Randolph*, 53 Ill. 510; 5 Am. Rep. 60. In some cases the question of negligence under such circumstances is for the jury: *Filer v. New York etc. R. R. Co.*, 49 N. Y. 47; 10 Am. Rep. 327; *Georgia R. R. etc. Co. v. McCurdy*, 45 Ga. 288; 12 Am. Rep. 577.

ENOS v. SANGER.

[96 WISCONSIN, 151.]

VENDOR AND PURCHASER—ASSUMPTION OF A DEBT DUE A THIRD PERSON.—If a grantee in a conveyance to him assumes and agrees to pay the debt of a third person as part of the consideration for his purchase, he thereby becomes liable to such third person although his grantor is not liable for the debt and no consideration passes to the grantee from either of the other parties. The liability rests solely on the promise.

Action to foreclose a mortgage. C. M. Sanger purchased land under a deed providing that the grantee assumed and agreed to pay a certain mortgage debt on the land. He denied that he was personally liable for such debt under the deed, and recovered judgment to that effect. Plaintiffs appealed.

Miller, Noyes, Miller & Wahl, for the appellants.

C. F. Hunter, for the respondent.

152 MARSHALL, J. The decisions of the various courts are by no means uniform, either in respect to the binding effect of a covenant by a grantee of land to pay the consideration therefor to a third person, or the ground upon which the obligation rests, if sustained. It is useless to review and try to harmonize the various adjudications. In fact, it is difficult to find a line upon which they can be harmonized respecting the ground of the liability. In this state the liability rests upon the doctrine that where one person, for a valuable consideration, engages with another to do some act for the benefit of a third person, the latter may maintain an action against the promisor for the breach of the agreement. Such doctrine is the settled law in this state: *Bassett v. Hughes*, 43 Wis. 319; *Hoile v. Bailey*, 58 Wis. 434; *Grant v. Diebold etc. Co.*, 77 Wis. 72; *Kollock v. Parcher*, 52 Wis. 393, and many other cases that might be cited. All that is required to render such rule applicable is for the obligor, for a sufficient consideration to support the promise, ¹⁵³ to agree to do some act for the benefit of a third person. No question of subrogation or novation is involved. Such third person, whether sustaining any relation to the person with whom the agreement is made or not, or to the person from whom the consideration moves, may adopt such promise made for his benefit, and thereby bring himself into privity with the obligor, and enforce the promise. While the incidental effect of the execution of such promise is to discharge the debt of another to such third person, such promise is really to pay the debt of the promisor, to perform his

own contract, entered into for a sufficient consideration to support it: *Kollock v. Parcher*, 52 Wis. 393; *Hoile v. Bailey*, 58 Wis. 434.

In *Bishop v. Douglass*, 25 Wis. 696, the liability of the grantee to pay the mortgage debt was placed on the ground that he received the conveyance subject to a condition, and thereby became bound to perform it, which, as applied to the facts of that case, is only another way of stating the rule before referred to. In *Palmer v. Carey*, 63 Wis. 426, the liability was based on the same principle, though, as in *Bishop v. Douglass*, 25 Wis. 696, the rule was not distinctly stated other than by saying that "the grantee became liable for payment of the mortgage debt by making a valid promise to pay it." In *Brewer v. Dyer*, 7 Cush. 337, the principle is stated in the language of Mr. Justice Craig as follows: "Thus, upon the principle of law long recognized and clearly established, where one person, for a valuable consideration, engages with another to do some act for the benefit of a third, the latter, who would enjoy the benefit of the act, may maintain an action for the breach of such agreement. It does not rest upon the ground of any actual or supposed relationship between the parties, as some of the earlier cases seem to indicate, but upon a broad and more satisfactory basis that the law, operating upon the acts of the parties, creates the debt, establishes the privity, and implies the promise and obligation on which the action is founded." ¹⁵⁴ In most, if not all, jurisdictions where the liability of a grantee to pay a debt secured upon the property conveyed to him, because of his promise in the conveyance, is sustained on the ground stated, the fact of whether the grantor was liable for the debt or not is held immaterial: *Dean v. Walker*, 107 Ill. 540; 47 Am. Rep. 467; *Bay v. Williams*, 112 Ill. 91; 54 Am. Rep. 209; *Merriman v. Moore*, 90 Pa. St. 78; *Hare v. Murphy*, 45 Neb. 809.

From the foregoing authorities which more directly state the doctrine that has long prevailed in this state, applicable to this class of cases, than any case in our own court, and from the general principle upon which such cases rest, that has long been the settled law here, we deduce the following: Where a grantee, in the conveyance to him, assumes and agrees to pay the debt of a third person as part of the consideration for his purchase, there is no necessity for any consideration to pass from such third person or his creditor to such grantee to support such agreement; a portion of the consideration for the purchase being left in such grantee's hands, appropriated by the grantor to the payment of

the debt which such grantee agrees to pay in consideration of the conveyance and of such appropriation of the purchase money, he cannot be heard to object to the performance of his contract because his grantor was not liable for such debt. When the grantor makes such an appropriation, and the grantee, for a sufficient consideration, promises to pay the amount so appropriated to the creditor of such third person, such grantee thereby becomes liable to such creditor; and such liability rests solely on such consideration and such promise.

By the Court. The judgment of the superior court is reversed, and the cause remanded for further proceedings in accordance with this opinion.

VENDOR AND PURCHASER—ASSUMPTION OF MORTGAGE—RIGHTS OF PURCHASER.—A grantee who covenants with the grantor to pay off a mortgage on the premises becomes in equity the principal debtor with respect to the mortgage debt: *Note to Blood v. Crew Levick Co.*, 55 Am. St. Rep. 747. He cannot dispute the validity or consideration of the mortgage: *Parkinson v. Sherman*, 74 N. Y. 88; 30 Am. Rep. 268. He is liable to the mortgagee therefor, though his grantor was not liable: *Dean v. Walker*, 107 Ill. 540; 47 Am. Rep. 467, and extended note; monographic note to *Klapworth v. Dressler*, 78 Am. Dec. 86, 87.

DOCTER v. RIEDEL.

[96 WISCONSIN, 158.]

PROCESS—MALICIOUS ABUSE OF.—Process must have been used to accomplish some unlawful end, or to compel the party against whom it has issued to do some collateral thing which he could not legally be compelled to do, in order to support an action for malicious abuse of process.

PROCESS—MALICIOUS ABUSE OF.—If a creditor, knowing that his debtor is able and will pay a judgment note on demand, without making such demand enters judgment on the note at 10 o'clock at night, and immediately issues execution and levies it by forcibly breaking into the debtor's store, with intent to injure his business and credit, the creditor is not liable to an action for malicious abuse of process.

BANKS AND BANKING—APPLICATION OF DEPOSIT ON NOTE.—A bank holding money on an open account to the credit of a maker of a note held by it is not compelled to apply the money thereon before bringing suit.

Hoyt, Odgen & Olwell, for the appellants.

J. E. Roehr, for the respondents.

160 WINSLOW, J. The complaint charges, in brief, that the defendants, without previous demand, entered judgment upon a

judgment note at 10 o'clock at night, and immediately issued execution thereon, and broke into the plaintiffs' store, and levied upon their stock of goods, with the malicious intent thereby to injure and destroy the plaintiff's business credit and reputation, and that the plaintiffs, on being informed of the seizure, immediately paid the judgment and procured release of the levy. Plainly, the complaint does not state a case of malicious prosecution of a civil action, because the action ended favorably to the present defendant, thus demonstrating that there was not only probable, but perfect, cause for bringing it: *O'Brien v. Barry*, 106 Mass. 300; 8 Am. Rep. 329.

It is claimed, however, that a cause of action is stated for abuse of process. The authorities upon the question of what will constitute a cause of action for abuse of process are ¹⁶¹ certainly in a state of some confusion, and frequently this action seems to have been confounded with actions for malicious prosecution, although they are essentially different actions. The leading case on the subject, perhaps, is the case of *Grainger v. Hill*, 4 Bing. N. C. 212. Here the plaintiff was arrested at a time when he could not procure bail, and kept under arrest until he surrendered a ship's register. The *capias* was a valid writ, regularly issued upon a good cause of action, but it was used to effect an ulterior and illegitimate purpose; and for that use there was held to be a remedy in tort, regardless of the question whether the original action was determined, or whether it was founded on probable cause. So, where an execution is issued upon a judgment already paid, or for an excessive amount, and goods are levied upon, a remedy is given. In these and similar cases, as said by an eminent text-writer, "it is enough that the process was willfully abused to accomplish some unlawful purpose": *Cooley on Torts*, 2d ed., 220, 221. This is probably the test, namely, whether the process has been used to accomplish some unlawful end, or to compel the defendant to do some collateral thing which he could not legally be compelled to do: *Johnson v. Reed*, 136 Mass. 421.

Applying this test to the case before us, we do not discover any cause of action stated. The process of the court has been used to collect a valid debt, and in precisely the manner that the plaintiffs here consented to its use by the judgment note. By this instrument the plaintiffs authorized its holder to enter judgment and issue execution at any time, and this is all that has been done. The defendants seem to have acted strictly within their right. The general rule is, that where one exercises a legal right, his undisclosed motives are immaterial: *Phelps v. Nowlen*,

72 N. Y. 39; 28 Am. Rep. 93; Raycroft v. Tayntor, 68 Vt. 219; 54 Am. St. Rep. 882. We see no reason why the rule should not apply here. The defendants having collected their debt in a way which they were ¹⁶² authorized to use, we cannot punish them for their secret motives.

The plaintiffs had an open account at the bank, upon which there stood eight hundred and fifty dollars to their credit, and they claim that this should have been applied upon the note. Whether the bank had a right to make such an application without consent may be doubtful, but, whether it could do so or not, we see no reason for holding that it was obliged to do so.

By the Court. Order reversed, and action remanded with directions to sustain the demurrer.

MR. JUSTICE MARSHALL dissented, and maintained that malicious abuse of process is not only where it is used for some unlawful object within its scope, but also that the "malicious misuse of process may take place where no object but its proper and legitimate execution is contemplated. Here the object intended was the execution of the judgment. Defendant had a legal right to collect it, but the proceedings to that end were unnecessarily harsh and oppressive, and with bad intent; hence the actionable injury": Citing in support of this view Rogers v. Brewster, 5 Johns, 125; Juchter v. Boehm, 67 Ga. 534; Snyder v. Brosse, 51 Ill. 357; 99 Am. Dec. 551; Casey v. Hanrick, 69 Tex. 44; Smith v. Weeks, 60 Wis. 94. "The principle governing this subject may be stated thus: If process to collect a judgment be executed in an unnecessarily harsh and oppressive manner, with a malicious purpose to injure the judgment debtor, such conduct constitutes an actionable wrong. In executing such a process the officer must not be guilty of oppression, or make use of greater force or violence than the thing requires. If he does, he is guilty of an abuse of process, and liable for damages: Alderson on Judicial Writs, sec. 179, p. 514. Applying the above-stated principle to the complaint before us, the order overruling the demurrer to the complaint was obviously right, and should be sustained."

PROCESS—MALICIOUS ABUSE OF—WHEN ACTION WILL LIE.—Abuse of process is the malicious perversion of a regularly issued process to accomplish some purpose, whereby a result not lawfully nor properly attainable under it is secured: Nix v. Goodhill, 95 Iowa, 282; 58 Am. St. Rep. 434, and note; Antcliffe v. June, 81 Mich. 477; 21 Am. St. Rep. 533. A party is not permitted to take out a writ of attachment, knowing it to be invalid, and issued upon an affidavit confessedly defective, and attach property under it not subject to levy, and thus gain information or evidence upon which to base a proper writ, and sustain that writ by such means: Rosenthal v. Circuit Judge, 98 Mich. 208; 39 Am. St. Rep. 535.

BANKS—APPLICATION OF DEPOSIT ON NOTE.—While a bank which is the holder of a note and has on deposit, at the time of maturity, a sum to the credit of any party liable to it on the note sufficient to pay it, and not previously appropriated by the depositor to be held for a different purpose, may apply it to the payment of the note, yet it is not, in general, bound to do so: *First Nat. Bank v. Peltz*, 176 Pa. St. 513; 53 Am. St. Rep. 686, and note. But it may be bound to do so to protect indorsers, where the deposit belongs to the maker of the note: *Mechanics' etc. Bank v. Seitz*, 150 Pa. St. 632; 30 Am. St. Rep. 853, and note; *First Nat. Bank, v. Peltz*, 176 Pa. St. 513; 53 Am. St. Rep. 686.

MORAWETZ v. SUN INSURANCE OFFICE.

[96 WISCONSIN, 175.]

GARNISHMENT.—A FOREIGN INSURANCE COMPANY cannot be garnished in a state where it does business through an agent, by a resident thereof on account of its indebtedness to a nonresident defendant, arising from a loss occurring in another state, especially where under the statute such defendant cannot maintain an action on his claim within the state. The voluntary appearance of such defendant in the main action does not confer jurisdiction in the garnishment proceeding.

GARNISHMENT—FOREIGN CORPORATIONS.—A NON-RESIDENT CREDITOR cannot have his property in a debt seized in a state to which the debtor corporation may resort merely for the purpose of doing business through agents, when the claim arises on a contract not to be performed within the state, and the debtor does not reside therein. A debt has no situs for the purpose of garnishment in a state of which the plaintiff, the defendant, and the garnishee are all nonresidents, although the latter is a foreign corporation which, by general provisions of a state statute, is subject to garnishment in such state.

Turner, Bloodgood & Kemper and J. B. Kemper, for the appellant.

Quarles, Spence & Quarles, and G. Lines, for the respondent.

176 CASSODAY, C. J. It appears from the record, and is in effect found by the court, that February 4, 1893, the defendant, a British insurance corporation having its principal office in the United States in the city of New York, issued its policy of fire insurance to the principal defendant, Klingbeil, then residing at Alliance, Nebraska, upon his stock of general merchandise located and situated in said Alliance, for twelve hundred dollars; that said property was destroyed by fire July 3, 1893; that due proof of loss under such policy was made by Klingbeil, August 7, 1893; that September 30, 1893, the garnishee papers were served on the defendant corporation's agent

in Milwaukee, but the sheriff returned that Klingbeil could not be found in that county nor Wisconsin; that Klingbeil appeared in an action against him October 7, 1893; that October ¹⁷⁷ 28, 1893, judgment was entered against him therein; that October 14, 1893, Klingbeil assigned his claim against said insurance company under the policy to M. E. Smith & Co., Kilpatrick-Koch Dry Goods Company, and Groneweg & Schoentgen, who were interpleaded herein; that thereafter said loss was adjusted, and paid by said garnishee in Nebraska to the parties interpleaded herein, to whom the whole of the claims of said Klingbeil against the garnishee on account of said loss had been so assigned, upon their giving the garnishee a bond of indemnity; that the garnishee is, and was at the time mentioned, doing business in the various states in the Union as a fire insurance company, and in the state of Nebraska under the statutes of that state; that the garnishee answered, setting up some of the facts stated, and denying liability; that the plaintiff took issue with such answer; that upon the trial thereof the court found the facts stated, and as conclusions of law the court found, in effect, that Kingbeil could not have brought or maintained any action against said garnished company in any court in Wisconsin on the said cause of action by the service of process upon such corporation or any officer or agent thereof, since none of the conditions existed upon which such service is authorized by the laws of Wisconsin; that this garnishment could not be maintained; that the garnishee was entitled to judgment herein dismissing the said garnishee action, with costs and disbursements of this action, to be taxed; and that judgment was thereupon ordered to be entered accordingly. From the judgment so entered thereon the plaintiff brings this appeal.

Under the statutes of this state, a creditor is expressly authorized to proceed by garnishment against any person having "any property whatever, real or personal, in his possession or under his control belonging to such creditor's debtor": Sanborn and Berryman's Annotated Statutes, sec. 2752. "The words 'personal property' include money, goods, chattels, things in ¹⁷⁸ action and evidences of debt": Rev. Stats., sec. 4972, subd. 3.

"Practically, garnishment is a seizure in the hands of the garnishee by notice to him, creating an effectual lien upon the garnished property to satisfy whatever judgment the plaintiff may recover in the suit in which it is issued": Rood on Garnishment, sec. 1. "So the service of garnishee papers upon the garnishee operates as an equitable levy upon such of the debtor's

property and credits as were at the time of such service in the hands of the garnishee": *Winner v. Hoyt*, 68 Wis. 287; *Globe Milling Co. v. Boynton*, 87 Wis. 632; *Rood on Garnishment*, sec. 192, and cases there cited. "Jurisdiction in such cases of garnishment, where the defendant in the principal action is a non-resident, has been upheld mainly upon the ground that such proceeding is substantially in rem to subject specific property or credits to the payment of a specific debt": *Winner v. Hoyt*, 68 Wis. 286, 287. "Jurisdiction is the authority to hear and determine the cause, and refers to the power of the court over the parties, the res or property in contest, and the authority of the court to entertain the suit or proceeding, and render the judgment or decree which it assumes to make. In garnishment proceedings all the statutory prerequisites to commencement of suit are jurisdictional and must be strictly complied with": *Rood on Garnishment*, sec. 221. This court has gone further, and held that, even after jurisdiction over the res or property has been acquired by the service of garnishee papers upon the garnishee, yet that such jurisdiction may be divested and lost by failure to comply with the statute as to service upon the principal defendant or his attorney: *Sanborn and Berryman's Annotated Statutes*, sec. 2756; *Globe Milling Co. v. Boynton*, 87 Wis. 632. This is on the theory, often adjudicated, to the effect that "the authority to institute and prosecute garnishee proceedings is entirely statutory, and, unless the requirements of the statutes are complied with, the proceedings cannot be sustained": *McDonald v. Vinette*, 58 Wis. 179 619. "Property outside of the state is not the subject of garnishment under our statute": *Bates v. Chicago etc. R. R. Co.*, 60 Wis. 296; 50 Am. Rep. 369; *Renier v. Hurlbut*, 81 Wis. 30; 29 Am. St. Rep. 850.

There is no pretense that the garnishee's agent in this state upon whom the garnishee papers were served, had at the time in his possession or under his control any specific property or rights of property belonging to Klingbeil. The extent of the claim is that at that time the garnishee was indebted to Klingbeil—a resident of Nebraska—on a policy of insurance upon property in that state which had been destroyed by fire, and hence that such indebtedness was attached by the service of the garnishee papers upon this foreign insurance company's agent in Milwaukee. The plaintiff in this action, by virtue of this garnishment, stepped into Klingbeil's shoes, and acquired his rights of action, but he had no better right to maintain this action in the courts of this state than Klingbeil would have had: *Healey*

v. Butler, 66 Wis. 9, 16; Rood on Garnishment, sec. 46. Although the plaintiff was at the time a resident of this state, yet, for the purpose of maintaining this garnishee action against this foreign corporation, he must be regarded, *pro hac vice*, as a resident of Nebraska, and not of this state. But Klingbeil could not have maintained an action in any of the courts of this state against the garnishee for the cause of action stated, for the reason that our statute expressly declares that "such service can be made upon a foreign corporation only, either when it has property within the state or the cause of action arose therein, or the cause of action exists in favor of a resident of the state": Sanborn and Berryman's Annotated Statutes, sec. 2637, subd. 11; Commercial Nat. Bank v. Chicago etc. Ry. Co., 45 Wis. 172; Myer v. Liverpool etc. Ins. Co., 40 Md. 595. This brings the case within the ruling of this court in Renier v. Hurlbut, 81 Wis. 24, 29 Am. St. Rep. 850, except that the principal defendant did not appear in that case.

The general appearance of the principal defendant in the ¹⁸⁰ main action in the case at bar did not cure the defect in the garnishment proceedings: Rood on Garnishment, sec. 232; Beaupre v. Brigham, 79 Wis. 436. It has been held by a federal court of high authority that: "A nonresident creditor cannot have his property in a debt seized in a state to which the debtor [corporation] may resort merely for the purpose of doing business through agents, when the claim arose on a contract not to be performed within the state, and the debtor does not reside therein. A debt has no situs, for the purpose of garnishment, in a state of which the plaintiff, defendant, and garnishee are all non-residents, although the garnishee is a foreign corporation which, by general provisions of a state statute, is subject to garnishment in the state, because it assumes to do business there": Reimers v. Seatco Mfg. Co., 70 Fed. Rep. 573. To the same effect: Caledonia Ins. Co. v. Wenar (Tex. Civ. App., Jan. 25, 1896), 34 S. W. Rep. 385; Central Trust Co. v. Chattanooga etc. Ry. Co., 68 Fed. Rep. 685; Douglass v. Phenix Ins. Co., 138 N. Y. 209; 34 Am. St. Rep. 448.

By the Court. The judgment of the superior court of Milwaukee county is affirmed.

GARNISHMENT — JURISDICTION — CORPORATIONS. — A debt may be garnished in any state in which process of garnishment may be served on the debtor, or in which he might be sued and a personal judgment entered against him, based upon service of process within the state. The effect of the garnishment is not

dependent upon residence in the state of the creditor whose debt is garnished, nor is it necessary that the person or corporation garnished be a resident of the state, if he or it is within the state at the time the garnishment process is served: *Lancashire Ins. Co. v. Corbetts*, 165 Ill. 592; 56 Am. St. Rep. 275, and note. Compare *Railroad v. Barnhill*, 91 Tenn. 395; 30 Am. St. Rep. 889; *German Bank v. American etc. Ins. Co.*, 83 Iowa, 491; 32 Am. St. Rep. 316.

GARNISHMENT—SITUS OF DEBT—GARNISHMENT IN ANOTHER STATE.—It has been held that garnishment proceedings must be instituted in the state where the debt is payable and the property is to be delivered, and that a garnishment in one state of a debt due and payable in another is void: *American etc. Ins. Co. v. Hettler*, 37 Neb. 849; 40 Am. St. Rep. 522, and note; *Illinois etc. R. R. Co. v. Smith*, 70 Miss. 344; 35 Am. St. Rep. 651. On the other hand, it is stated that wherever a creditor may maintain a suit to recover his debt, it may be there attached as his property: *Wyeth Hardware etc. Co. v. Lang*, 127 Mo. 242; 48 Am. St. Rep. 624, and note; that although the situs of intangible personalty may be at the domicile of the creditor for the purpose of taxation or distribution, yet, for the purpose of collecting a debt, it is ambulatory, accompanying the person of the debtor, and may be attached wherever he may be found: *Neufelder v. German-American Ins. Co.*, 6 Wash. 336; 36 Am. St. Rep. 166; and that to this extent the laws of a state, for the purposes of attachment proceedings, may fix the situs of a debt at the domicile of the debtor: *Douglass v. Phoenix Ins. Co.*, 188 N. Y. 209; 84 Am. St. Rep. 448, and note.

MATHWIG v. MANN.

[96 WISCONSIN, 213.]

MECHANIC'S LIENS.—BONA FIDE PURCHASERS.—A mechanic's lien holder is not a purchaser within the meaning of a statute providing that unrecorded conveyances shall be void as against subsequent purchasers in good faith and for a valuable consideration whose conveyances are first duly recorded.

MECHANICS' LIENS—MORTGAGES—PRIORITY.—Although a statute provides that a mechanic's lien shall have priority over any lien originating subsequently to the commencement of the construction of the building, such mechanic's lien is not superior to the lien of a mortgage, executed prior to, but recorded after, the commencement of such construction.

MECHANICS' LIENS—MORTGAGES—PRIORITY.—If mortgages are both executed and delivered, and the money which they are given to secure is advanced, before the commencement of the construction of a building on the mortgaged premises, liens for labor and material used in such building are subject to the liens of the mortgages, though the latter are not recorded.

Timlin & Glicksman, for the appellant.

N. Pereles & Sons, Fiebing & Killilea, J. E. Roehr, and E. F. J. Goldsmith, for the respondents.

214 CASSODAY, C. J. This action was commenced November 11, 1893, to enforce liens for labor performed and materials

furnished by the plaintiff and the defendants—other than the defendant Mann and the church corporation—in the aggregate amount of \$3,747.05, and to have such liens adjudged prior and superior to the mortgages in favor of the defendant Mann. Mann answered, and, in effect, denied that his mortgages were subsequent and subordinate to such other liens, and claimed that they were prior and superior thereto.

Upon the trial before J. F. Harper, as referee, he found, as matters of fact, in effect, that the defendant Beth Hamidrosch Haggodol Congregation was at all the times mentioned a religious corporation, and on and prior to May 13, 1893, was the owner in fee simple of the lot described, being less than an acre, subject to an existing mortgage thereon of \$3,000; that at that time there were situated on said premises two dwelling-houses and several sheds and outbuildings; that for the purpose of building a house of worship thereon, ²¹⁵ the members of the congregation, at a meeting called for that purpose, May 13, 1893, by a resolution adopted, authorized its trustees to borrow of the defendant David S. Mann, for the purpose of building its proposed temple, \$12,000 for the term of five years, and thereby authorized its president, secretary, and trustees to execute, sign, and deliver to Mann, in behalf of the corporation, as securities for the payment of said \$12,000 and interest, two notes and two mortgages of \$6,000 each; that May 17, 1893, the corporation, by its president, secretary, and trustees, in pursuance of such resolution, made and executed its two promissory notes, each bearing date on that day, in and by which the corporation promised to pay to the order of David S. Mann the sum of \$6,000 five years after date, with interest as therein stated; that May 17, 1893, the corporation, by the same officers, in pursuance of such resolution, signed and executed, each under its corporate seal, two mortgages, each on said premises, to secure said notes, respectively; that said notes and mortgages so executed, signed, witnessed, and acknowledged were, at Milwaukee, May 17, 1893, delivered by said corporation to said Mann, who then and there accepted the same, and said Mann then and there, in consideration of the same, advanced, loaned, and passed to the credit of said corporation the whole sum of \$12,000; that by an arrangement by and between the corporation and one Weil, acting as agent for Mann, it was agreed that said sum of \$12,000 should be held by Weil for the benefit of, and subject to the order of, the corporation, and should be paid out upon the demand of the corporation, as such corporation might order; that upon the order of the corporation there

was paid out of said \$12,000 the sum of \$3,010 to the holder and owner of the previously existing mortgage on said premises, in full payment of the principal sum thereof and interest thereupon, and said previously existing mortgage was satisfied and canceled of record; that the corporation employed Keller & Son ²¹⁶ to remove the two dwelling-houses situated on the premises, and to do certain work of remodeling, repairing, and refitting said dwelling-houses when they should be so removed, and that such work was commenced May 18, 1893, and not before; that the corporation engaged the plaintiff and the several other defendants for the performance of certain work and labor, and the furnishing of certain materials, in and about the erection and construction of the church building on said real estate, which work and labor were performed and which materials were furnished as therein stated; that the construction and erection of said church building was commenced May 19, 1893, and not before, and no work was done in or about the erection or construction of said church building upon said real estate before May 19, 1893; that all of said sum of \$12,000 was, upon the order of the corporation, paid by Weil to the contractors, laborers, and materialmen for work and labor performed and materials furnished in and about the removing, remodeling, and repairing of said two dwelling-houses on said real estate, and in and about the erection and construction of said church building on said real estate, except \$258.65 and the sum of \$3,010 so paid in discharge of the previously existing mortgage thereon; that said two mortgages were each duly recorded May 20, 1893; that Mann is still the lawful holder and owner of said notes and mortgages, and no part thereof has been paid, except the interest accruing on and before May 17, 1895; that Keller & Son had a lien thereon for \$1,847.42, commencing May 18, 1893; that the plaintiff had a lien thereon for \$437.94, commencing May 24, 1893; that the defendant William Grether had a lien thereon for \$803.77, commencing May 19, 1893; that the defendants Biersach & Niedermeyer had a lien thereon for \$354.52, commencing May 19, 1893; that the defendant Charles H. Koehler had a lien thereon for \$303.40, commencing May 24, 1893.

And as conclusions of law the referee found that said several ²¹⁷ liens for labor and materials attached May 18, 19, and 24, 1893, as found; that said mortgages became and constituted a lien upon said real estate, and attached thereto as such lien, May 17, 1893, and became at such time a lien thereupon to the amount of \$12,000 and the interest subsequently accruing thereon; that

such liens of said mortgages originated from the time of their execution and delivery, May 17, 1893, and originated and took entire effect as a lien upon said real estate before the commencement of the work of removing, remodeling, and repairing said dwelling-houses, and before the commencement, erection, or construction of said church building, and constituted a lien upon said real estate prior and superior to any and all of the liens for work or labor done or materials furnished, adjudged therein to the parties to this action.

The trial court ordered that the findings of fact made and reported by the referee be, and the same thereby were, confirmed and adopted as the findings of the court herein, and that each and all of the exceptions thereto be overruled; but the court differed with the referee only in the conclusions of law upon the findings of fact reported by him. The court was of the opinion that, as to the mechanic's lien claims, the lien of the mortgages attached to the real estate May 20, 1893, when the mortgages were recorded, instead of attaching thereto at the day of their delivery, and modified the conclusions of the referee accordingly, and ordered that such mechanics' liens be adjudged prior and superior to the liens of said mortgages; and that in all other respects said conclusions of law reported by said referee be, and the same thereby were, confirmed. Judgment was ordered to be entered thereon accordingly. From those portions of the judgment so entered thereon which are adverse to the defendant David S. Mann, he brings this appeal.

There is no question but that the mortgages were both properly executed and delivered by the corporation to the ²¹⁸ appellant Mann, May 17, 1893. They were conveyances, within the meaning of the statutes, and had the effect of conveying "the land therein described, together with all the rights, privileges, and appurtenances thereunto belonging, in pledge to the mortgagee, his heirs, assigns, and legal representatives, for the payment of the indebtedness therein" and thereby secured: Rev. Stats., secs. 2203, 2209, 2242. The only effect of such failure of Mann to record his mortgages for three days after they were executed and delivered to him was the liability of having the same become "void as against any subsequent purchaser in good faith, and for a valuable consideration, of the same real estate, or any portion thereof, whose conveyance" should first be duly recorded: Rev. Stats., sec. 2241. Manifestly, none of the parties here claiming liens for labor performed and materials furnished are subsequent purchasers in good faith and for a valuable considera

tion, within the meaning of this statute: *Butler v. Bank of Mazeppa*, 94 Wis. 351. The statute giving the liens to such laborers and materialmen is very plain, and cannot well be misunderstood. It is to the effect that such lien claimants shall have a lien upon such building, and upon the interest of the owner thereof in and to the land upon which the same is situated, and "such lien shall be prior to any other lien which originates subsequent to the commencement of the construction" of such building: *Sanborn and Berryman's Annotated Statutes*, sec. 3314. The mortgages in question were both executed and delivered, and the money for the repayment of which they were given to secure, and the whole thereof, was actually advanced prior to the commencement of the construction of the church building, and hence the liens for such labor and materials were necessarily subject to the liens of the mortgages. The language of the statute giving such liens will admit of no other construction, and the authorities on the subject are to the same effect: *Rees v. Ludington*, 13 Wis. 276; 80 Am. Dec. 741; *Jessup v. Stone*, 13 Wis. 466; *Wisconsin Planing Mill Co. v. Schuda*, 72 Wis. 277. A learned author on such liens says: "Recording is not necessary to give the mortgage priority of such lien under recording acts which make the recording necessary only as against subsequent purchasers and mortgagees. Thus, where a mechanic's lien attaches to property by the commencement of work upon the premises after the execution of a mortgage, but before the recording of it, the mortgage is superior, by virtue of the prior execution": 2 *Jones on Liens*, 2d ed., sec. 1460. This language is applicable to our statutes. The judgment, under our statute, is only upon "the interest of the owner in the premises at the time of the commencement of the construction . . . of the building": *Sanborn and Berryman's Annotated Statutes*, sec. 3324.

By the Court. The portions of the judgment of the circuit court which Mann appeals from are reversed, and the cause is remanded for further proceedings in accordance with this opinion.

MECHANICS' LIENS—CONFLICT WITH UNRECORDED ENCUMBRANCES.—Mechanic's lien holders are not purchasers, and must at their peril, take notice of all liens, and encumbrances, whether recorded or not: *Nashua Trust Co. v. Edwards Mfg. Co.*, 99 Iowa, 109; 61 Am. St. Rep. 226, and note. A mechanic's lien begins when the work is commenced or the materials furnished: *Note to Vilas v. McDonough Mfg. Co.*, 51 Am. St. Rep. 932; and is paramount to the lien of a mortgage executed after the building was

commenced, but before such labor or material was furnished: Haxtun etc. Heater Co. v. Gordon, 2 N. Dak. 246; 33 Am. St. Rep. 776, and note. A lien or mortgage existing at "the inception" of a mechanic's lien is protected: Oriental Hotel Co. v. Griffiths, 88 Tex. 574; 53 Am. St. Rep. 790. Compare Farmers' Bank v. Winslow, 3 Minn. 86; 74 Am. Dec. 740.

IN RE WILL OF LYON.

[96 WISCONSIN, 339.]

WILLS—ATTESTING WITNESS.—THE WIFE OF AN EXECUTOR of a will is a competent attesting witness thereto.

WILLS—MARRIAGE—REVOCATION BY.—The marriage of a woman does not revoke her will, if her common-law disabilities in respect to the disposition of her property have been removed by statute.

Gertrude S. Cole, a widow, made her will, devising her estate to Alice A. Sully and Clary A. Sully. She appointed G. C. Cole her executor, and his wife signed the will as an attesting witness. The testatrix afterward married one Lyon, and thereafter died without issue. Her husband contested the probate of the will. Judgment was rendered against him, and he appealed.

P. T. Krez, for the appellant.

W. C. Cole and F. Williams, for the respondent.

340 MARSHALL, J. It is assigned as error for a reversal of the judgment that the trial court should have held the wife of the executor not a competent attesting witness and the will void on that account. The executor was not beneficially interested so as to affect the competency of the wife to testify either by common law or by statute: See Redfield on Wills, 257, 259; Millay v. Wiley, 46 Me. 230; Cassoday on Wills, secs. 190, 192; Bettison v. Bromley, 12 East, 250. She was competent to testify to the facts at the time the will was executed, and that satisfies the universal test: Cassoday on Wills, sec. 177; Schouler on Wills, sec. 351; In re Holt's Will, 56 Minn. 33; 45 Am. St. Rep. 434. The question is one that has been so long settled that no extensive discussion of the subject seems to be warranted.

It is further assigned as error that the court should have decided that the subsequent marriage of the testatrix revoked the will by operation of law. Section 2290 of the Revised Statutes provides, in effect, that wills may be revoked, by implication of law, by subsequent changes in the condition or circumstances of the testator. That merely preserves the common-law rule on the

subject, except as abrogated by implication in the manner hereafter stated. At common law, the marriage of a woman revoked her will previously made, but such rule is generally (there are exceptions) held to have been changed by the statutory removal of her disabilities in respect to the disposition of her property: *Noyes v. Southworth*, 55 Mich. 173; 54 Am. Rep. 359; *Roane v. Hollingshead*, 76 Md. 369; 35 Am. St. Rep. 438; *In re Hunt*, 81 Me. 275; *Morton v. Onion*, 45 Vt. 152—cited ³⁴¹ by respondent's counsel. Also, *In re Tuller's Will*, 79 Ill. 99; 22 Am. Rep. 164; *Fellows v. Allen*, 60 N. H. 439; 49 Am. Rep. 328; *Hoitt v. Hoitt*, 63 N. H. 475; 56 Am. Rep. 530. Formerly, the marriage of a man after the making of a will, and the birth of issue, by operation of law revoked the will. The inequality between the sexes in this regard grew wholly out of the change that marriage worked in the capacity of the woman to dispose of her property. Upon that being removed by statute in this and many other states, the inequality in the rule, as a necessary and natural result, ceased.

Though the authorities are not all one way, they greatly preponderate in favor of the views above expressed. Moreover, the subject is not open to discussion here, the point having been decided in *Ward's Will*, 70 Wis. 251, 5 Am. St. Rep. 174, where it is said, in effect, that, the statutes of this state having conferred upon married women the absolute power of disposing of their property by last will and testament without the consent of their husbands (Rev. Stats., secs. 2277, 2281), that removed every reason upon which the common-law rule of revocation by marriage subsequent to the making of will was based; hence such rule was, by implication, removed by the same statute. To be sure, in the case of *Ward's will*, the fact was that the testatrix had children by a former husband, and the court reserved the question of whether, in the absence of children, the common-law rule would not prevail, inasmuch as the husband is, under our statutes, heir of his wife, as well as the wife of the husband; but we do not think the statute in relation to inheritance makes any difference. The inequality formerly existing grew out, as stated, of the inequality in the capacity of the sexes to dispose of their property after marriage. That has been removed by a change in the capacity of the wife; hence the common-law rule as to the husband remains, and that of the wife has been changed by implication to conform to it.

In England and many of the states this whole subject is now regulated expressly by statute to the effect that marriage subse-

quent to the execution of a will revokes it, whether ³⁴² made by a man or a woman. Judicial decisions in such jurisdictions furnish no authority here, where the common law still prevails, except as changed by implication in the manner heretofore indicated.

It follows from the foregoing that the wife of the executor was competent to witness the execution of the will, and that the subsequent marriage of the testatrix did not revoke it, and that the judgment of the trial court should be affirmed.

By the Court. So ordered.

WILLS—ATTESTATION—COMPETENCY OF WITNESSES.—A wife is not a competent witness to a will containing a devise to her husband: *Sullivan v. Sullivan*, 106 Mass. 474; 8 Am. Rep. 356; *Fisher v. Spence*, 150 Ill. 253; 41 Am. St. Rep. 360; *Contra*, *In re Holt's Will*, 56 Minn. 33; 45 Am. St. Rep. 434. The executor named in a will is a competent attesting witness thereto, where he has no beneficial interest therein other than the commission on the estate allowed by law for his services: *Stewart v. Harriman*, 56 N. H. 25; 22 Am. Rep. 408; *Meyer v. Fogg*, 7 Fla. 292; 68 Am. Dec. 441.

WILL OF UNMARRIED WOMAN—EFFECT OF MARRIAGE.—In many of the states a woman's want of capacity to make wills has been removed by statute, and if her marriage operated to revoke her pre-existing will, she might, by republishing it, or by executing a will of like tenor, avoid the effect of such implied revocation; but in most of the states this removal of her want of capacity has been determined to be, in effect, the removal of all the reasons of the common-law rule, and therefore to make the rule itself obsolete, and to leave her antenuptial will in full force: See monographic note to *Graham v. Burch*, 28 Am. St. Rep. 358; *Roane v. Hollingshead*, 76 Md. 369; 35 Am. St. Rep. 438, and note; *Matter of McLarney*, 153 N. Y. 416; 60 Am. St. Rep. 664, and note.

MONSON v. LATHROP.

[96 WISCONSIN, 386.]

LIBEL.—A TELEGRAPHIC MESSAGE directed and sent to a clergyman stating that "the citizens of Wisconsin demonstrated you are an unscrupulous liar," is libelous per se.

LIBEL.—THE PUBLICATION OF A LIBEL MAY BE THE JOINT ACT of two or more persons, who may be sued either jointly or separately, at the election of the plaintiff.

LIBEL.—TELEGRAM—PUBLICATION.—The writing of a libelous telegraphic message and the delivery of it to the telegraph company for transmission constitute a publication thereof.

J. F. Cole, Quarles, Spence & Quarles, and G. Lines, for the appellant.

Cate, Sanborn, Lamoreux & Park, for the respondent.

³⁸⁷ CASSODAY, C. J. The amended complaint alleged, in effect, that at the times mentioned the plaintiff was a minister of the gospel and a member of the Lutheran church, and in charge as rector of the Lutheran Church Society at Amherst, Wisconsin. That November 5, 1894, there was a general election in Wisconsin. That November 7, 1894, the defendant Lathrop willfully and maliciously composed, wrote, and transmitted to the plaintiff by telegraph over the lines of the defendant the Western Union Telegraph Company, a foreign corporation doing business in this state, the false, libelous, and defamatory matter concerning the plaintiff following, with the innuendoes omitted, to wit: "Night message. The Western Union Telegraph Co. Dated Marshfield, Wis., 11-7-1894. To Rev. I. G. Munson: The citizens of Wisconsin demonstrated you are an unscrupulous liar. A Marshfield Democrat." That said Lathrop then and there willfully and maliciously delivered the said false, libelous, and defamatory matter, so composed and written, to the agent of the defendant company then and there in charge of its office at Marshfield, and duly authorized to receive and transmit the same, and then and there instructed the ³⁸⁸ said agent to transmit the message by telegraph to the plaintiff at Amherst; and thereupon the company willfully and maliciously transmitted the same to the plaintiff at Amherst, and delivered the same to him in writing at Amherst. That the agents and servants of the company at Marshfield and Amherst saw, read, and wrote the said message, and that, in the manner set forth, the defendants willfully and maliciously published of and concerning the plaintiff the false, libelous, and defamatory matter aforesaid, to his damage. To such complaint the defendant Lathrop separately demurred upon the ground that it appeared upon the face thereof that the same did not state facts sufficient to constitute a cause of action against him. From the order overruling such demurrer, the defendant Lathrop brings this appeal.

We are constrained to hold that the message was libelous per se: *Cranden v. Walden*, 3 Lev. 17; *Australian Newspaper Co. v. Bennett* [1894], App. Cas. 284; *Hake v. Brames*, 95 Ind. 161; *Bradley v. Cramer*, 59 Wis. 311; 48 Am. Rep. 511, and cases there cited.

It is contended that the complaint seeks to charge the two defendants jointly with the publication of the libel, and that it is insufficient for that purpose, and hence that the demurrer should have been sustained. Certainly, there are authorities holding that a telegraph company may be held liable for send-

ing libelous messages: *Whitfield v. South Eastern R. Co.*, 96 Eng. Com. L. 113; *El. B. & E.* 115; *Peterson v. Western Union Tel. Co.*, 65 Minn. 18. However this may be, it is well settled that the publication of a libel may be the joint act of two or more persons, who may, in such a case, be sued either jointly or separately, at the election of the plaintiff. But for two distinct publications of the same libel, one by A separately, the other by B, two actions must be brought, one for each publication. But the plaintiff is not obliged to join as a defendant every person who is liable. He may sue only one or two, and the ³⁸⁹ liability of the others will be no defense for those sued, or mitigate the damages recoverable: *Newell on Defamation, Slander, and Libel*, sec. 42, p. 382; *Odgers on Slander and Libel*, 440, 441. The demurrer raises no objection to the complaint on the ground of a defect of parties defendant, nor upon the ground that several causes of action are improperly united, and hence, under the statute, any such objection must be deemed to have been waived: *Rev. Stats.*, sec. 2654. It is therefore immaterial, under the authorities cited, whether the complaint charges both defendants with jointly publishing the libel. The real question is whether it states a cause of action against the defendant Lathrop.

The writing of the message, and the delivery of it by him to the company for transmission, as mentioned, was a publication of the same: *Wilson v. Noonan*, 27 Wis. 598; *Muetze v. Tuteur*, 77 Wis. 236; 20 Am. St. Rep. 115; *Loibl v. Breidenbach*, 78 Wis. 49. In the first of these cases it was held that "one who writes an article in English, and employs another person as his agent to translate it into German and publish it, will be liable if the German article so published is libelous, although the translation is inaccurate." In the last of these cases it was held that "one who negligently signs a libelous article without knowing its contents, and delivers it to the person who wrote it without any direction restricting the use to be made of it, is responsible for the publication thereof by the person to whom it is so delivered, where the article shows on its face that it is intended for publication": See, also, *Bacon v. Michigan Cent. R. R. Co.*, 55 Mich. 224; 54 Am. Rep. 372; *Peterson v. Western Union Tel. Co.*, 65 Minn. 18.

It follows that the demurrer was properly overruled.

By the Court. The order of the circuit court is affirmed.

LIBEL.—WHAT IS.—Any publication injurious to the social character of another, and not shown to be true, or justifiably made,

is actionable as a false and malicious libel: *Collins v. Dispatch Pub. Co.*, 152 Pa. St. 187; 34 Am. St. Rep. 636, and note. It is sufficient if the language tends to injure the reputation of the party, to throw contumely, or to reflect shame and disgrace upon him, or to hold him up as an object of scorn, ridicule, or contempt: *Adams v. Lawson*, 17 Gratt. 250; 94 Am. Dec. 455, and note; *Rice v. Simmons*, 2 Harr. (Del.), 417; 31 Am. Dec. 766, and note.

LIBEL—JOINT LIABILITY FOR.—An action for libel may be maintained against two, if the offense be a joint act done by both: *Harris v. Huntington*, 2 Tyler, 129; 4 Am. Dec. 728. All persons are liable who engage in publishing or circulating a libel; and by reason of the doctrine of the several liability of tort feorsors, the remedy must be pursued against one or more of those guilty of the wrong: *Belo v. Fuller*, 84 Tex. 450; 31 Am. St. Rep. 75, and note.

LIBEL—PUBLICATION OF—WHAT CONSTITUTES.—To constitute publication of a libel, the contents of the writing need not be made known to the public generally. It is enough if they be made known to a single person: *Adams v. Lawson*, 17 Gratt. 250; 94 Am. Dec. 455, and note; note to *Alabama etc. Ry. Co. v. Brooks*, 30 Am. St. Rep. 533. The mischief of a libel consists in the fact that it is seen by third persons: *Park v. Detroit Free Press Co.*, 72 Mich. 560; 16 Am. St. Rep. 544.

WAREHOUSE AND BUILDERS' SUPPLY CO. v. GALVIN.

[96 WISCONSIN, 523.]

SHIPPING—LIEN FOR FREIGHT—JURISDICTION.—A shipowner, as a common carrier, has a particular and specific lien at common law for his freight upon the goods carried, which he may enforce in a state court.

SHIPPING—REPLEVIN—LIEN FOR FREIGHT—JURISDICTION.—Replevin by the owner, and consignee of goods shipped, by water, to recover possession thereof from the owner of the ship who claims a lien thereon growing out of the contract of carriage, is an action to enforce a common-law remedy, and not a proceeding in admiralty, and may be prosecuted in the state courts.

CONTRACTS OF CARRIAGE—ENTIRETY.—A contract to carry a specific number of barrels of salt between certain points for a specific amount of freight per barrel is an entire contract. If only a part is delivered for shipment, the carrier is entitled to a lien thereon at the place of delivery for the entire contract price of the freight.

SHIPPING—LIEN FOR FREIGHT—ADMIRALTY JURISDICTION.—If a shipper fails to furnish or deliver to the vessel the full amount of goods which he has contracted to furnish or deliver, the lien of the vessel upon the goods so furnished or delivered is enforceable in admiralty, whether the action is treated as one to recover freight or to recover damages for the nonperformance of a contract.

SHIPPING—LIEN ENFORCEABLE IN ADMIRALTY—JURISDICTION.—If a shipowner has a lien upon goods enforceable in the admiralty courts, the owner thereof cannot recover them by replevin in the state courts.

H. H. Grace and H. R. Spencer, for the appellants.

F. H. Remington, for the respondent.

527 CASSODAY, C. J. It is claimed that the trial court had no jurisdiction of the subject matter of the action. This is put upon the ground that such jurisdiction is vested exclusively in the federal courts of admiralty and maritime jurisdiction: U. S. Const., art. 3, sec. 2; U. S. Rev. Stats., sec. 563, subd. 8. In support of such contention counsel rely upon cases holding that upon an ordinary contract of affreightment the lien of the shipper is a maritime lien; and a proceeding in rem to enforce it is within the exclusive original cognizance of the district courts of the United States: *The Belfast*, 7 Wall. 624. But the statute giving to federal courts such exclusive jurisdiction "of all causes of admiralty and maritime jurisdiction," expressly saves "to suitors in all cases the right of common-law remedy where the common law is competent to give it": U. S. Rev. Stats., sec. 563. The same clauses are contained in the section of the federal statutes expressly making the jurisdiction vested in the federal courts in certain cases "exclusive of the courts of the several states": U. S. Rev. Stats., sec. 711, subd. 3. "The distinguishing and characteristic feature" of a suit in admiralty, to use the language of Mr. Justice Field, "is that the vessel or thing proceeded against is itself seized and impleaded as a defendant, and is judged and sentenced accordingly. It is this dominion of the suit in admiralty over the vessel or thing itself which gives to the title made under its decree validity against all the world. By the common-law process, whether of mesne attachment or execution, property is reached only through a personal **528** defendant, and then only to the extent of his title. Under a sale, therefore, upon a judgment in a common-law proceeding, the title acquired can never be better than that possessed by the personal defendant. It is his title, and not the property itself, which is sold": *The Moses Taylor*, 4 Wall. 427.

This is certainly not a suit in admiralty. On the contrary, it is an ordinary action of replevin, brought by the owner and consignee of the goods shipped against the owners of the boat transporting the same, and those claiming under them, to recover possession of the goods shipped. It is one of the common-law remedies saved to suitors, so far as the common law is competent to give such remedy. The court, therefore, had jurisdiction of the action, and could retain the same, so far as to determine the questions within its rightful jurisdiction.

The defendants, as common carriers, had a particular and specific lien at common law upon the goods so carried for their freight in carrying the same: 1 Jones on Liens, secs. 262, 263.

The same author says: "Carriers by water have a lien as well as carriers by land. A shipowner has a lien for freight upon the goods carried, whether the vessels be chartered or be general ships carrying goods for all persons for hire. The master is not bound to deliver possession of any part of his cargo until the freight and other charges due in respect to such part are paid. This lien may be regarded as a maritime lien, because it is cognizable in the admiralty, and under the usages of commerce arises independently of the agreement of the parties. The shipowner may retain the goods until the freight is paid, or he may enforce it by a proceeding in rem in the admiralty court; but, although the lien is maritime and cognizable in the admiralty, it stands upon the same ground with the common-law lien of the carrier on land, is subject to the same principles, except as regards enforcement, and may, therefore, be considered ⁵²⁹ in connection with the liens of carriers by land": 1 Jones on Liens, secs. 270, 271. See, also, Hutchinson on Carriers, secs. 476-479. The court, therefore, had jurisdiction to determine the amount of such lien for carriage at common law, and whether the amount of freight tendered by the plaintiff was sufficient to discharge the same.

True, the statutes of this state provide, among other things, in effect, that every ship, boat, or vessel used in navigating the waters of this state shall be liable to a lien thereon (3) for all demands or damages accruing from the nonperformance or malperformance of any contract of affreightment, or any contract touching the transportation of property entered into by the master, agent, owner, or consignee of the ship, boat, or vessel on which such contract is to be performed; such lien "to be enforced by proceedings in admiralty," or in the cases therein mentioned as therein prescribed—that is to say, by attachment: Sanborn and Berryman's Annotated Statutes, secs. 3348, 3351. But the plaintiff is not here seeking to enforce any such lien against the boat, and hence the statutes give no support to this action.

The question recurs whether the owners of the vessel, and those acting under them, had the right to retain the possession of the 818 barrels of salt so carried until such owners had been paid, not only ten cents a barrel for each of the 818 barrels so carried, but also ten cents a barrel for each of the 4,182 barrels which the plaintiff failed to furnish for carriage as agreed. We are constrained to hold that the contract to carry the 5,000 barrels of salt at ten cents a barrel, was, in legal effect, an entire contract to carry the 5,000 barrels for \$500. In other words,

the contract was not divisible. This principle has often been applied by this court to a contract to work for a year, or some other definite time, at so much per month: *Jennings v. Lyons*, 39 Wis. 553; 20 Am. Rep. 57; *Diefenback v. Stark*, 56 Wis. 462; 43 Am. Rep. 719; *Koplitz v. Powell*, 56 Wis. 671. The reasons for the rule are sufficiently stated in these cases. ⁵³⁰ The principles upon which the rule is based are peculiarly applicable to a contract of affreightment, since the amount of the goods shipped is necessarily an inducement or consideration for making the contract. Such being the nature of the contract, it is manifest that the tender of freight by the plaintiff was insufficient, and hence that the plaintiff is not entitled to recover the possession of the salt in this action.

But, even if we were to take a different view of the contract, still we are inclined to hold that the plaintiff could not recover in this action. In this country it is firmly established in admiralty law that the vessel and the cargo have reciprocal rights against each other, and reciprocal liens to enforce the rights of each against the other: *Parsons on Shipping and Admiralty*, 171. Upon this principle it has been held by federal courts in this country, in effect, that, where a shipper fails to furnish or to deliver to the vessel the full amount of goods which he had contracted to furnish or deliver, the lien of the vessel upon the goods so furnished or delivered would be enforced in admiralty, whether the action be treated as one to recover freight or to recover damages for the nonperformance of a contract: *In re 948 Pieces of Lumber*, 7 Ben. 389; *Fox v. Holt*, 4 Ben. 278; *The Eliza's Cargo*, 1 Low. 83; *Clarke v. Crabtree*, 2 Curt. 87; *The B. J. Willard*, 8 Week. Not. Cas. 47; *Giles v. The Cynthia*, 1 Pet. Adm. 203, and note; *Watts v. Camors*, 115 U. S. 353; *The Gazelle and Cargo*, 128 U. S. 474. This principle includes demurrage. This lien of the vessel upon the cargo justified the owners of the vessel, and those acting under them, in retaining possession of the goods actually carried until such lien was satisfied or legally discharged; and it was incompetent for the state court to prevent the vessel from enforcing such lien in admiralty, or to deprive the owners of the vessel of such possession so long as such lien continued: *Stewart v. Potomac Ferry Co.*, 12 Fed. Rep. 296. Counsel for the plaintiff has cited English ⁵³¹ cases holding a different rule, but we feel bound by the decisions of our federal courts in admiralty cases.

By the Court. The judgment of the superior court of Doug-

las county is reversed, and the cause is remanded with direction to dismiss the complaint.

SHIPPING—LIEN FOR FREIGHT.—The master of a vessel has a general lien on his cargo for freight and charges: *Everett v. Coffin*, 6 Wend. 603; 22 Am. Dec. 551; and is not bound to part with any of the goods until the entire freight is paid: *Frothingham v. Jenkins*, 1 Cal. 42; 52 Am. Dec. 286, and note. A bill of lading is complied with by delivering two thousand two hundred and seventeen bushels of corn, if no more is shipped, where it recites the shipment of, and an agreement to deliver two thousand two hundred and eighty-two bushels, more or less, and the master is entitled to freight on the number of bushels actually delivered: *Kelly v. Bowker*, 11 Gray, 428; 71 Am. Dec. 725; see monographic note to *Chandler v. Sprague*, 38 Am. Dec. 413, 414.

SHIPPING—ADMIRALTY JURISDICTION OF STATE COURTS. The admiralty and maritime jurisdiction of the United States in rem is exclusively in the United States courts, and there is no concurrent jurisdiction in rem in admiralty cases between the courts of the United States and of the several states. Such concurrent jurisdiction, however, does exist in the case of common-law remedies such as debt, assumpsit, case, trespass, trover and the like, which are not proceedings in rem or against a vessel itself, for courts of common law do not proceed in rem: See monographic note to *Keating v. Spink*, 62 Am. Dec. 242-244; *Case v. Woolley*, 6 Dana, 17; 32 Am. Dec. 54; *Thompson v. Morton*, 2 Ohio St. 26; 59 Am. Dec. 658. Where admiralty jurisdiction of the United States courts attaches, it undoubtedly excludes the jurisdiction of the state courts: *Gindele v. Corrigan*, 129 Ill. 582; 16 Am. St. Rep. 292, and note

BUTERO v. TRAVELERS' ACCIDENT INSURANCE CO.

[96 WISCONSIN, 536.]

INSURANCE—ACCIDENT—INTENTIONAL INJURY.—If a policy of accident insurance provides that the insurer shall not be liable for "intentional injury inflicted by the insured or any other person," there can be no recovery when injury to the insured is intentional as to the person inflicting it, though accidental as to the insured, in that he does not expect or anticipate it.

INSURANCE—ACCIDENT—EVIDENCE.—If a policy of accident insurance provides that the insurer shall not be liable for injury intentionally inflicted by the insured or any other person, the insured cannot recover if the evidence of intentional injury preponderates against the presumption of accident.

INSURANCE—ACCIDENT—EVIDENCE—INTENTIONAL INJURY.—Under an accident insurance policy providing that the insurer shall not be liable for intentional injury inflicted by the insured or any other person, evidence that the insured was killed by a pistol shot on a dark, stormy night while at work with a companion in a lighted shed, that the shot which killed him was followed by two others, each of which inflicted a mortal wound, and that one of the shots was fired so near him as to discolor his clothing with powder, is sufficient to establish the fact that he was intentionally murdered by one who knew him, and no recovery can be had under the policy in such case.

H. W. Chynoweth, for the appellant.

L. H. Mead, for the respondent.

⁵³⁹ PINNEY, J. The contract upon which the action is founded is, that the insurance provided by it "does not cover accident or death resulting wholly or partly, directly or indirectly, from . . . intentional injuries, inflicted by the insured or any other person." In view of the facts in evidence and about which there is really no dispute, the question is ⁵⁴⁰ whether the legal presumption invoked by the plaintiff, that the injuries the deceased received were accidental or unintentional, is not wholly repelled or overborne by the evidence. The presumption in question properly applies where there is no evidence to show the circumstances and manner in which the injuries were inflicted. The defendant is not liable if the injuries which caused the death of the insured were intentionally inflicted by himself or any other person. While this is a defense, and the burden of proof is ordinarily upon the defendant, yet, if it appears upon plaintiff's evidence, or upon the entire case, that such injuries were intentionally inflicted, the legal presumption is overthrown. The defense may be established by facts and circumstances, and the inferences properly to be drawn from them, sufficient to satisfy the jury of the truth of the defense with reasonable certainty. It is beyond question or dispute that the insured came to his death by external and violent means. The legal presumption is, that his death was not caused by his own suicidal act. The evidence clearly shows that the external and violent means of his death proceeded from some person unknown. The inquiry is as to the question whether the shooting that caused his death was accidental or intentional and with the design of effecting his death; and this question is to be determined from the facts proved, the manner of his death, and all the attending circumstances. If the killing was accidental as to the insured in that he anticipated or expected no injury, but was intentional as to his assassin, then, according to the plain language of the provision of the policy, there can be no recovery: *Travelers' Ins. Co. v. McConkey*, 127 U. S. 661-667; *Mallory v. Travelers' Ins. Co.*, 47 N. Y. 52; 7 Am. Rep. 410. The case of *Button v. American etc. Assn.*, 92 Wis. 83, 53 Am. St. Rep. 900, was upon a provision materially differing from the one in question, and this case is, therefore, not in point. It is necessary only that the evidence of intentional killing preponderate against the presumption of ⁵⁴¹ accident: *Cronkhite v. Trav-*

elers' Ins. Co., 75 Wis. 119; 17 Am. St. Rep. 184; Johns v. Northwestern etc. Assn., 90 Wis. 335; Bachmeyer v. Mutual etc. Assn., 87 Wis. 337, 338.

The plaintiff's counsel relies upon Hutchcraft v. Travelers' Ins. Co., 87 Ky. 300, 12 Am. St. Rep. 484, in which it was held that one assassinated comes to his death by accidental means; but in that case there was not, as there is in this, a provision to the effect that the policy of insurance did "not cover accident or death resulting wholly or partly, directly or indirectly, from . . . intentional injuries inflicted by the insured or any other person," and it is not in point. Nor is American Acc. Co. v. Carson, 99 Ky. 441, 59 Am. St. Rep. 473, which did not contain the same or a similar provision. The same is true of Insurance Co. v. Bennett, 90 Tenn. 256; 25 Am. St. Rep. 685.

The killing was clearly the result of intelligent human agency. Was it accidental or intentional? The assured went, at 6 o'clock in the afternoon, from his supper table, to his employment as a coal heaver in the coalshed, where he was to spend the night with his companion in hoisting coal. The night was a very dark one. It thundered and lightened and rained, particularly at the time he received the fatal shots. They worked continuously until about 11 o'clock, with their backs toward the railway track upon which the coalshed opened, with two lighted lamps near them, and with the upright hoist between them, operated by cranks, one working on either side. When they had partly raised a bucket of coal, and, so far as it appears, when they were utterly unaware of the presence of any human being, they were startled by a pistol shot, which sent a bullet crashing through the brain of the insured, and he fell dead where he had stood; and two other shots, either of which would have proved fatal, were fired in rapid succession into vital parts of his body. His companion, Dominique, instantly fled and ran about a block to the station. He had seen no one about there during the evening, and had heard no one, and there ⁵⁴² is nothing to show that the assured had, or that he uttered any word or exclamation. He was presently found dead where he fell, and the evidence tends to show that one of the shots was fired with the weapon so near his body as to discolor his clothing with the burning powder. The shots could have proceeded only from the open side of the shed next to the railway track, and it was lighted with two lamps as stated. The hour and the night was one in which honest men are not likely to be abroad with firearms. The time, place, and circumstances were suited to criminal purposes. It

seems impossible for persons of reasonable intelligence to be deceived, in the presence of these pregnant facts pointing unmistakably to only one conclusion. If it were possible to conclude that the first shot was fired accidentally, what are we to think in respect to that question, when it was instantly followed by two other shots, evidently aimed at vital portions of the body of the insured, and which took effect, inflicting fatal wounds? How many shots are we to believe were accidentally thus fired in rapid succession upon and into vital parts of the body of the insured, and under circumstances so favorable for assassination, at a time when firearms would be mainly in requisition or use for criminal purposes?

It is contended, however, that there is no evidence that the assassin, at the time he inflicted the wounds, intended to inflict them on the body of the insured—that is to say, that there is no evidence to show that he knew, at the time he inflicted them, that he was inflicting them upon the body of Butero, the insured; and that, in the absence of such proof, the killing must be regarded as accidental, and covered by the provisions of the policy. The case of *Utter v. Travelers' Ins. Co.*, 65 Mich. 545, 8 Am. St. Rep. 913, is confidently relied on. In that case the provision of the policy was that the insurance “should not be held to extend . . . to any case of death or personal injury, unless the claimant under this policy ⁵⁴³ shall establish, by direct and positive proof, that said death or personal injury was caused by external violence and accidental means, and was not the result of design, either on the part of the insured or of any other person.” In that case, the testimony was conflicting as to the circumstances of the killing; that of the plaintiff tending to show that the officer knew the insured, and demanded his surrender as a deserter, and shot him in self-defense, while that of the defendant tended to show that the shooting was reckless, and that the officer did not know the deceased, nor that he had shot him, until after the killing. It was held that the case should have been submitted to the jury, and that the design mentioned in the policy must be considered as a design to kill the insured, and, if such design did not exist when he fired the shot, or if he did not know that the man he was shooting at was the insured, then the plaintiff might recover on the policy.

The present case is clearly distinguishable. Here there is evidence sufficient to show that the assassin intended to shoot Butero, the insured, and that when shooting he knew that he was shooting him, and intended to kill him. It is true that no

witness has testified to this effect in so many words, but this is the just and proper result of the facts and circumstances given in evidence and in respect to which there is no conflict or dispute. It cannot be expected that the assassin would expressly declare his recognition of his victim, either immediately before or at the time of firing repeated fatal shots in and upon his body. All this is ordinarily to be left to inference, from a variety of facts and circumstances proved before the jury. Here the assassin went to the place, at the late hour of 11 o'clock at night, when a violent storm was prevailing, where Butero worked with his companion, approaching him from behind, when there were two lights burning near him. He did not direct his fire against Dominique, but at once selected his victim, ⁵⁴⁴ and sent a bullet through his head from which he fell dead, and he followed it by two other shots, evidently aimed with murderous intent, inflicting wounds either of which would have been fatal, and at a time when the evidence tends to show that he stood near enough to his victim to quite touch him with his extended hand. Had the first shot been fired through accident, and not intentionally, it is not reasonable to suppose it would have been followed at once by others. Is it not a just and reasonable conclusion that the assassin recognized, and had no doubt of the identity of, his victim, and followed the first shot by two others to certainly execute his deadly purpose? There is no evidence, fact, or circumstance tending to show, or even suggest, that the death of Butero, the insured, was accidental, within the meaning of the policy. The facts admit, we think, of but one conclusion. *Res ipsa loquitur*.

We think that the evidence was sufficient to show with reasonable certainty that Butero was murdered, and that his murderer knew his victim when he fired the fatal shot, and that he fired it with intent to kill him. The court erred, in our judgment, in refusing to set aside the verdict and grant a new trial.

By the Court. The judgment of the circuit court is reversed, and the cause remanded for a new trial.

INSURANCE—ACCIDENT—INTENTIONAL INJURY INFLICTED UPON INSURED BY ANOTHER.—Death from the direct violence of a third party may be an accident within the meaning of a policy insuring the life of the deceased: *Lovelace v. Travelers' Protective Assn.*, 126 Mo. 104; 47 Am. St. Rep. 638, and note; *Insurance Co. v. Bennett*, 90 Tenn. 256; 25 Am. St. Rep. 685, and note; *Union Casualty Co. v. Harroll*, 98 Tenn. 591; 60 Am. St. Rep. 873. Where the policy in question excepted the insurer from liability for intentional injuries, the word "intentional" was held to refer to

acts of the insured alone, and not to cover an injury intentionally inflicted upon the insured by another: *Button v. American Mut. Acc. Assn.*, 92 Wis. 83; 53 Am. St. Rep. 900. Where the exception in a policy expressly covers injuries intentionally inflicted by a third person, as appears in the principal case, it is difficult to see how such an injury can be held as not coming within the exception: *Hutchcraft v. Travelers' Ins. Co.*, 87 Ky. 300; 12 Am. St. Rep. 484; note to *Paul v. Travelers' Ins. Co.*, 8 Am. St. Rep. 766. The words allow no other interpretation than that given in the principal case: *Button v. American Mut. Acc. Assn.*, 92 Wis. 83; 53 Am. St. Rep. 900; though in *American Acc. Co. v. Carson*, 99 Ky. 441, 59 Am. St. Rep. 473, the court, straining the rule that doubtful conditions of forfeiture in insurance policies should be resolved in the manner most favorable to the insured, held such an exception to refer only to non-fatal injuries intentionally inflicted by the insured or any other person, and allowed a recovery where the insured was fatally injured by the intentional act of a third person.

REINHARD v. REINHARD.

[96 WISCONSIN, 555.]

DIVORCE—CRUEL AND INHUMAN TREATMENT.—Evidence that husband and wife have lived in the same house, and eaten at the same table food prepared by her, without his speaking to her except in anger, for three months at a time, is sufficient to establish cruel and inhuman treatment on his part and to justify the court in granting her a divorce.

DIVORCE—CRUEL AND INHUMAN TREATMENT.—Personal violence, whether actual or threatened, or even gross and abusive language, is not absolutely essential to constitute cruel and inhuman treatment warranting the granting of a divorce to the injured party.

MARRIAGE AND DIVORCE—FINAL DIVISION OF PROPERTY.—The conclusion of the court in divorce proceedings to make a final division of the property of a husband upon proper proof is subject to change and modification prior to the entry of judgment, and is not a final division within the meaning of a statute providing that when the estate of the husband is finally divided in such case, no other provision can thereafter be made for the wife.

C. W. Briggs, for the appellant.

W. J. Turner, for the respondent.

556 CASSODAY, C. J. This is an action for divorce, on the ground of cruel and inhuman treatment, otherwise than by personal violence. The answer consists of admissions, denials, and counter-allegations, and, among other things, that the plaintiff had fallen in love with some other person.

At the close of the trial, the court found, as matters of fact, in effect, that both parties were residents of Milwaukee, and had been since 1890; that they were married July 28, 1880; that there

was no issue of such marriage; that the allegations in plaintiff's amended complaint as to cruel and inhuman treatment were proven and true; that the defendant was guilty of the cruel and inhuman treatment charged in the complaint, practiced otherwise than by personal violence; that the property of the defendant was so situated that it was to the best interests of the parties that there should be a final division of the defendant's estate between the plaintiff and the defendant; that the court was not then sufficiently advised by proofs as to the value of the defendant's estate or the division thereof which ought to be made. Among the allegations of the complaint so found to be true are those to the effect that, for a very long time before the commencement of the action, the defendant treated the plaintiff in a cruel and heartless manner, and with utter indifference and neglect; that about six years before, in a fit ⁵⁵⁷ of anger, he struck her; that in June, 1895, he raised his hand in a threatening manner, as if to strike her, and said that, if she had not then cause for divorce, he would give her cause, and drove her out of the house; that he was of a sullen and morose disposition, and for three months prior to May, 1894, refused to speak or communicate with her, but ignored her entirely; that the plaintiff, having saved a little money, and believing that separation for a short time might restore affection, went to Germany, and remained there from May to September, 1894; that upon her return, he, for about four weeks, treated her kindly, and then again commenced to treat her with indifference and to ignore her entirely, and refused to speak to her or communicate with her, and did not speak to her until May, 1895, although the plaintiff and defendant lived in the same house and ate at the same table, the plaintiff preparing the morning meal, the others being taken at a boarding house; that such treatment was so notorious that it was observed by others, and caused the plaintiff great sorrow, shame, and disgrace, and at one time so depressed her that she attempted to commit suicide; that, by reason of such treatment, plaintiff had lost affection, regard, respect, and esteem for the defendant, and could no longer remain in the same house with him; that the plaintiff's health had been ruined by such treatment.

And, as conclusions of law, the court found, in effect, that the plaintiff was entitled to judgment of divorce, and ordered the same accordingly, and thereupon referred the case to a court commissioner, to take proofs of the value of the defendant's estate and report the same to the court, with his recommendation

as to the division proper to be made between the parties, and that, upon the coming in of the report, a further decree would be entered making division of said property, as to the court it might seem just and proper. Upon such report being made and hearing had, the court modified the same and its findings, so as to allow the plaintiff to have ⁵⁵⁸ and recover from the defendant alimony, instead of a division of the estate. The report was otherwise confirmed. The court found that fifty dollars per month was a fair and reasonable sum for the defendant to pay the plaintiff as permanent alimony, to commence October 22, 1896; and that the defendant be required to secure the payment thereof by bond, with sureties to be approved by the court, conditioned for the payment thereof on the first day of each and every month; and that the defendant pay to the attorneys of the plaintiff three hundred and fifty dollars as attorney's fees, in addition to the attorney's fees to be taxed in the action, and ordered judgment accordingly; and from judgment so entered the defendant brings this appeal.

The evidence as to cruel and inhuman treatment is not as pronounced and tangible as would naturally be expected in such a case, but, after careful consideration, we are constrained to hold that the findings of the trial court in that respect are sustained by the evidence. Marriage implies companionship, and is supposed to be based upon mutual regard and affection. For a husband and wife to live and sleep in the same house, and eat at the same table food prepared by the wife, without the husband speaking to the wife, except in anger, for a period of three months at a time, must have been, at least, very disagreeable, if not unbearable. That such was the fact does not seem to be very seriously disputed. It certainly evinced abnormal affections, persistent wantonness, and deliberate perversity. The effect of such conduct upon a nervous, sensitive woman can better be imagined than described, and may have seriously impaired the plaintiff's health, as found by the court. This court has repeatedly held that personal violence, whether actual or threatened, or even gross and abusive language, is not absolutely essential to constitute cruel and inhuman treatment: *Freeman v. Freeman*, 31 Wis. 235; *Crichton v. Crichton*, 73 Wis. 59; *Wachholz v. Wachholz*, 75 Wis. 377; ⁵⁵⁹ *Hacker v. Hacker*, 90 Wis. 325. We cannot hold that the divorce was improperly granted.

It is true, as contended, that when the husband's estate, in such a case, is finally divided, no other provision can thereafter be made for the wife: Rev. Stats., secs. 2364, 2369. But no

such final division was ever made in the case at bar. The mere conclusion to so finally divide was subject to such change and modification as the trial court might make, prior to the time of the entry of the judgment thereon. We have concluded, however, to reduce the permanent alimony from fifty dollars per month to twenty-five dollars per month.

By the Court. That part of the judgment of the circuit court so allowing fifty dollars per month is reversed and modified so as only to allow twenty-five dollars per month, but the judgment in all other respects is affirmed; the taxable costs of this court to be paid by the defendant.

MARRIAGE AND DIVORCE—DECREE DIVIDING HUSBAND'S PROPERTY—WHEN FINAL.—A judgment is not final unless it is complete and definite in its nature, and a valid and subsisting obligation: *Dow v. Blake*, 148 Ill. 76; 39 Am. St. Rep. 156 and note; monographic note to *Williams v. Field*, 60 Am. Dec. 427. A judgment is final when it allows a gross sum to a wife in a divorce suit, as a final distribution of the husband's estate between the parties: *Dow v. Blake*, 148 Ill. 76; 39 Am. St. Rep. 156; but where, in an action for divorce the bonds of matrimony are ordered dissolved, but the court reserved its decision on the questions of the division of the common property, and the custody of the child, the judgment is not final: See monographic note to *Williams v. Field*, 60 Am. Dec. 438.

Cruelty as a Ground for Divorce.*

Cruelty, within the meaning of the divorce law, may be defined to be any conduct of one of the married parties which furnishes reasonable apprehension that the continuance of the cohabitation will be attended with bodily harm to the other. When actual violence has been exercised by one married person toward the other, it is well settled that such violence, to authorize a divorce, must be attended with danger to life, limb, or health, or be such as to cause reasonable apprehension of future danger. To this effect the authorities are numerous and uniform, as the following citations will show: *Morris v. Morris*, 14 Cal. 76; 73 Am. Dec. 615, and extended note 619-631; *Poor v. Poor*, 8 N. H. 307; 29 Am. Dec. 664 and note 674, 679; *Latham v. Latham*, 30 Gratt. 307; *Myers v. Myers*, 83 Va. 806; *Perry v. Perry*, 2 Paige, 501; *Carlisle v. Carlisle*, 99 Iowa, 247; *Mayler v. Mayler*, 11 Ala. 620; *Hughes v. Hughes*, 19 Ala. 307; *King v. King*, 25 Ala. 815; *Thornberry v. Thornberry*, 2 J. J. Marsh. 322; *Waldron v. Waldron*, 85 Cal. 251; *Shaw v. Shaw*, 17 Conn. 190; *Williams v. Williams*, 23 Fla. 324; *Odom v. Odom*, 36 Ga. 286; *Caruthers v. Caruthers*, 13 Iowa, 268; *Cole v. Cole*, 23 Iowa, 433; *Gilbertson v. Gilbertson*, 78 Iowa, 735; *Potter v. Potter*, 75 Iowa, 211; *Bailey v. Bailey*, 57 Mass. 373; *Close v. Close*, 24 N. J. Eq. 338; 25 N. J. Eq. 526; *Kenley v.*

* REFERENCE TO MONOGRAPHIC NOTES.

Cruelty as ground for divorce: 29 Am. Dec. 674-677; 73 Am. Dec. 619-631; 49 Am. Rep. 461-462.

Kenley, 2 How. (Miss.) 751; **Ford v. Ford**, 104 Mass. 198; **Hughes v. Hughes**, 44 Ala. 698; **Beall v. Beall**, 80 Ky. 675; **Nogees v. Nogees**, 7 Tex. 538; 58 Am. Dec. 78; **Jones v. Jones**, 62 N. H. 463; **Ratts v. Ratts**, 11 Ill. App. 366; **Ruckman v. Ruckman**, 58 How. Pr. 278.

A late definition is that cruelty, whether inflicted by personal violence, or by ill-treatment operating primarily upon the mind, is limited to such treatment and conduct as produce bodily harm or ill-health, or furnish reasonable apprehension that further cohabitation would endanger the life or physical health of the complaining party: **Waldron v. Waldron**, 85 Cal. 251.

Cruel and barbarous treatment by one party rendering the condition of the complaining party intolerable or his or her life burdensome is a ground for divorce, although such treatment may not have endangered life: **Barnsdall v. Barnsdall**, 171 Pa. St. 625.

To entitle one of the parties to divorce on the ground of cruelty, the acts complained of must be of such a nature as to justify a belief that the continuance of cohabitation will be dangerous to life and health: **Vanduzer v. Vanduzer**, 70 Iowa, 614. Cruel and inhuman treatment, authorizing a divorce, or which will permit the injured party to say that further cohabitation will be unsafe or improper, must be actual personal violence, committed with danger to life, limb, or health, or there must be a reasonable apprehension of personal violence, arising from menaces or threats creating a reasonable fear of bodily harm. Mere austerity of temper, petulance of manners, rudeness of language, or even occasional sallies of passion, if they do not threaten bodily harm, do not amount to legal cruelty: **De Mell v. De Mell**, 67 How. Pr. 20; **Waldron v. Waldron**, 85 Cal. 251; **Poor v. Poor**, 8 N. H. 307; 29 Am. Dec. 664; **Kenley v. Kenley**, 2 How. (Miss.) 751.

It is generally held that cruelty, as a foundation for divorce, must be unmerited and unprovoked: **Poor v. Poor**, 8 N. H. 307; 29 Am. Dec. 664; and in some jurisdictions, although they are in the small minority, it is maintained that there must be acts of personal and actual violence to justify the granting of a divorce on the ground of cruelty. Thus in **Moyler v. Moyler**, 11 Ala. 620, it was held that to constitute legal cruelty authorizing a divorce, there must be actual violence committed, attended with danger to life, limb, or health, or there must be a reasonable apprehension of such violence. To the same effect are **Hughes v. Hughes**, 19 Ala. 307; **Close v. Close**, 24 N. J. Eq. 338; 25 N. J. Eq. 526; **Ford v. Ford**, 104 Mass. 198; **Hughes v. Hughes**, 44 Ala. 698; **Jones v. Jones**, 66 Pa. St. 494; **Fizette v. Fizette**, 146 Ill. 328.

The cases which maintain this rule also assert that vulgar, obscene, and harsh language, with epithets suited to deeply wound the feelings and excite the passions, but not accompanied with any act or menace indicating violence to the person, does not constitute legal cruelty: **Shaw v. Shaw**, 17 Conn. 189; **Close v. Close**, 24 N. J. Eq. 338; **Ruckman v. Ruckman**, 58 How. Pr. 278; **Folmar v. Folmar**, 69 Ala. 84.

What acts of a spouse constitute cruelty authorizing a divorce cannot be described with precision, and each case must be deter-

mined according to its own peculiar circumstances, by the court or jury, always keeping in view the intelligence, apparent refinement, and delicacy of sentiment of the complaining party: *Fleming v. Fleming*, 95 Cal. 430; 29 Am. St. Rep. 124; *Williams v. Williams*, 23 Fla. 324; *Jones v. Jones*, 62 N. H. 463.

In an action for divorce for treatment injuring health and endangering reason, the question whether a husband or wife has been treated by the other so as to seriously injure health or endanger reason is one of pure fact. It cannot be declared as a matter of law that any particular "treatment" may not have that effect: *Robinson v. Robinson*, 66 N. H. 600; 49 Am. St. Rep. 632. Cruelty, where it does not affect life, limb, or health, is frequently a relative term, whose meaning must be determined by the particular circumstances of each case. Between persons of education, refinement, and delicacy, the slightest blow in anger might be cruelty, while between persons of a different character and walk in life, it might not mar to any great extent their conjugal relations nor materially interfere with their happiness: *David v. David*, 27 Ala. 222.

Instances of Cruelty by Actual Violence.—Where a husband has been guilty, or there is reasonable ground to apprehend that he will be guilty, of any actual violence which will endanger the safety or health of his wife, or where he has inflicted upon her any physical injury, accompanied by such persistent exhibition of ill-feeling and opprobrious epithets as will endanger her health, or render her life one of such extreme discomfort and wretchedness as to incapacitate her to discharge the duties of a wife, he is guilty of cruelty entitling her to a divorce: *Close v. Close*, 25 N. J. Eq. 526. But a divorce will not be granted for cruelty, if it appears that the complaining party has willfully provoked the violence or misconduct complained of, unless such violence greatly exceeds the provocation: *Reed v. Reed*, 4 Nev. 395; *Knight v. Knight*, 31 Iowa, 451; *Poor v. Poor*, 8 N. H. 307; 29 Am. Dec. 664; *Skinner v. Skinner*, 5 Wis. 449; *Von Glahn v. Von Glahn*, 46 Ill. 134; *Johnson v. Johnson*, 14 Cal. 460; *Lalande v. Jore*, 5 La. Ann. 32; *Hitchins v. Hitchins*, 140 Ill. 326; *Masterman v. Masterman*, 58 Kan. 748; *Owen v. Owens*, 90 Iowa, 365.

Where a wife applies to her husband opprobrious names, and throws a fryingpan at him and a dishcloth in his face under provocation, she is not guilty of inhuman treatment: *Peavey v. Peavey*, 76 Iowa, 443. Slight acts of violence by a wife toward her husband are not cruelty unless he is able to show that he is unable to protect himself by proper exercise of his marital powers: *Auraud v. Auraud*, 157 Ill. 321; *Hitchins v. Hitchins*, 140 Ill. 326. But violent and outrageous conduct on the part of a wife, toward her husband, rendering the proper discharge of the duties of married life impossible, is cruelty on her part: *Lynch v. Lynch*, 33 Md. 328. Thus, where a wife breaks the glass doors of her husband's store, strikes him, and interferes with his customers, breaks dishes and throw them downstairs, throws hot water on the hired girl, and when her stepsons complain of their dinner, throws slop on the table, she is guilty of legal cruelty: *Heilbron v. Heilbron*, 158 Pa.

St. 297; 38 Am. St. Rep. 845. Violence committed during a quarrel, in which a husband suffers as much as his wife, is not such cruelty as will justify a divorce against him: *Soper v. Soper*, 29 Mich. 305. Irritability of temper on the part of a husband, producing ungovernable passion, and occasionally ending in acts of personal violence rendering cohabitation unsafe, is a peril from which his wife is entitled to protection, although she may not be wholly blameless. When the passions of a husband are shown to be so much beyond his own control that it is inconsistent with the personal safety of his wife to continue in his society, it is immaterial from what provocation such violence may have originated: *King v. King*, 28 Ala. 315. While a wife will not be granted a divorce on the alleged cruel treatment and excessively vicious conduct of her husband when she has been guilty of equally cruel treatment toward him, yet no abusive or reproachful words of a wife justifies her husband in assaulting and beating her. Hence the latter conduct is cruelty, no matter what the aggravation: *Hawkins v. Hawkins*, 65 Md. 104. If the husband, on more than one occasion, inflicts violence upon the person of his wife, so that the marks thereof remain, he is guilty of cruelty authorizing divorce, which is not excused by the fact that she has a bad temper and scolds him: *Eidenmuller v. Eidenmuller*, 37 Cal. 364. Although the wife has been peevish, quarrelsome, and needlessly meddlesome in her husband's business and other affairs, and has provoked much of the abuse heaped upon her by her husband, yet such conduct is no excuse for the husband in repeatedly beating and abusing her, and his conduct in such case is cruel and inhuman treatment: *Schichtl v. Schichtl*, 88 Iowa, 210.

Threats by a husband to chastise his wife, boasts of having done so, bruises found upon her person inflicted by him, an offer by her to return and live with him if he would agree not to whip her, and a declination on his part, are the infliction of such indignities to her as to render her condition intolerable, her life burdensome, and to entitle her to a divorce: *Taylor v. Taylor*, 76 N. C. 433.

Actual personal violence, though not very great, nor such as standing alone, would warrant a divorce, if accompanied by inhuman, coarse, and brutal treatment toward a wife, entitle her to a divorce: *Thomas v. Thomas*, 20 N. J. Eq. 97. Violence and ill-treatment of a child by the father, intended to cause the mother grief, and resulting in aggravating her illness, and accompanied with offensive and unreasonable epithets, calculated to degrade her, are cause for divorce: *Dunlap v. Dunlap*, 40 La. Ann. 1696. Striking a wife in the face, choking her, and pulling her hair by her husband support a charge of cruelty: *Turner v. Turner*, 44 Ala. 437. Blows of any nature inflicted on a wife by her husband injuring her health or her body are cruelty: *Armant v. Armant*, 4 La. Ann. 137. But mere blows do not constitute cruelty if they do not inflict injury or give rise to apprehension of danger to life, limb, or health, and cause but slight unhappiness: *Nogees v. Nogees*, 7 Tex. 538; 58 Am. Dec. 78. If the conduct of a husband toward his wife is habitually cold, indifferent, rude, harsh, vulgar,

obscene, and profane, and she is seen shortly after being with him, in tears, with bruises on the face, lips and side of a serious character, and he admits that such bruises were administered by him, but claims that they were given in play and not in anger, he is guilty of legal cruelty justifying a divorce: *Goodrich v. Goodrich*, 44 Ala. 670. If a husband beats and kicks his wife without provocation while she is nursing her infant, and afterward threatens to repeat the assault and chases her out of his house with a switch, threatening to split her open, and keeps up such a course of conduct through a series of years, she is entitled to a divorce on the ground of his cruelty: *Myers v. Myers*, 83 Va. 806. Coarse and abusive language and epithets often repeated by a husband to his wife, coupled with personal violence and bodily harm inflicted by him upon her, with threats of taking her life, amount to extreme cruelty on his part: *Freeman v. Freeman*, 81 Wis. 235.

Violence Committed During Intoxication is not excused by reason of the drunkenness, and if continued constitutes cruelty. Thus, if a husband was habitually intoxicated, and when drunk was quarrelsome, turbulent, and dangerous; used profane language toward his wife, threatened to inflict personal violence upon her; endeavored to execute his threats by chasing her through the house and yard attempting to strike her with a chair, and on one occasion inflicting personal violence upon her, he is guilty of legal cruelty sufficient to entitle her to a divorce: *Hughes v. Hughes*, 19 Ala. 307. To the same effect: *Allen v. Allen*, 31 Mo. 479; *Crichton v. Crichton*, 73 Wis. 59; *Wachholz v. Wachholz*, 75 Wis. 377; *Lee v. Lee*, 3 Wash. 236.

Although a wife is not of the most refined character, and not always truly ladylike in her behavior, and at times when in anger is guilty of profanity, and has not remonstrated with her husband as she ought or rebuked him for using liquor to excess, yet this is no excuse for his violence toward her, and abuse of her during his drunken moods, which are habitual, such treatment by him is cruelty: *Berryman v. Berryman*, 59 Mich. 605. And if a drunken husband curses his wife and drives her from their house, and by demonstrations of violence causes her to leave the bedside of a dying child and seek safety and protection several miles distant, she is entitled to a divorce on the ground of his cruelty: *Scoggins v. Scoggins*, 85 N. C. 347. Where a husband's long-continued cruel treatment of his wife, caused by his voluntary and habitual intoxication, is such as to render her existence miserable, and to actually endanger her life, such treatment is extreme cruelty on his part: *McVickar v. McVickar*, 46 N. J. Eq. 490; 19 Am. St. Rep. 422. A divorce for cruel and inhuman treatment, and personal indignities rendering life burdensome, should be granted when it is shown that the husband was frequently intoxicated and was quarrelsome and violent, at one time kicking out a door-panel, and at another, while violently cursing his wife, shooting off a pistol several times, and that he was in the habit, without provocation, of using vile and offensive language to her. Such treatment is cruelty on his part: *Ryan v. Ryan*, 30 Or. 226. The law seems to

deal less harshly with women, for it has been held that outbreaks of passion and violence on the part of an intoxicated wife do not constitute such cruel treatment as will justify a divorce: *Shutt v. Shutt*, 71 Md. 193; 17 Am. St. Rep. 519.

Single Act of Violence.—Courts are generally loathe to consider one act of violence by one of the married parties toward the other as constituting such cruelty as will justify a decree for divorce. A large number of cases hold that one act of force or violence by one spouse, preceded or followed by deliberate insult or abuse, even though committed wantonly and without provocation, is not sufficient to constitute extreme cruelty: *Fritz v. Fritz*, 138 Ill. 436; 32 Am. St. Rep. 156; *Vignos v. Vignos*, 15 Ill. 186; *De La Hay v. De La Hay*, 21 Ill. 252; *Embree v. Embree*, 53 Ill. 394; *Shorediche v. Shorediche*, 115 Ill. 102; *Hoshall v. Hoshall*, 51 Md. 72; 34 Am. Rep. 298; *Hardie v. Hardie*, 162 Pa. St. 227; *Cutler v. Cutler*, 2 Brewst. 511; *Youngs v. Youngs*, 130 Ill. 230; 17 Am. St. Rep. 313; *Finley v. Finley*, 9 Dana, 52; 33 Am. Dec. 528; *Joyner v. Joyner*, 6 Jones Eq. 322; 82 Am. Dec. 421. A mere act of violence where there is no apprehension of its repetition, and which is the result of rashness rather than malignity, does not furnish ground for divorce on the ground of cruelty: *Reed v. Reed*, 4 Nev. 395.

A single act of cruelty or indignity, or of coarse and ungallant conduct on the part of a husband, although such act amounts to a technical assault, does not constitute sufficient ground for a divorce at the suit of his wife: *Nye's Appeal*, 126 Pa. St. 341; 12 Am. St. Rep. 873. The law does not permit a divorce for any single act of violence or abuse, however vulgar, rude, harsh, or unchivalrous, but it requires proof of such a course of conduct or continued ill-treatment as renders the complainant's condition intolerable and life burdensome: *Richards v. Richards*, 37 Pa. St. 225. Mere angry or abusive words, menaces, or indignities do not constitute cruelty. There must be extreme and repeated cruelty, which must consist in physical violence, and a single act of violence does not of itself constitute ground for divorce. There must be acts or threats which may raise a reasonable apprehension of bodily harm: *Fizette v. Fizette*, 146 Ill. 328.

It is proper, in deciding whether one act of cruelty on the part of a husband toward his wife is sufficient to entitle her to a divorce, to take into consideration the age, habits, and mode of life of the parties: *Lauber v. Mast*, 15 La. Ann. 593; *Huilker v. Huilker*, 64 Tex. 1.

Although a single act of violence, standing alone, is not sufficient ground for divorce, the question to be determined is, whether the act was committed under such circumstances as to furnish reasonable apprehension that the continuance of the cohabitation will be attended with further personal injury: *Cook v. Cook*, 11 N. J. Eq. 195. Under some circumstances, and when such apprehension has ground for its existence, a single whipping or beating of a wife by her husband, although she provokes the assault, is extreme cruelty: *Albert v. Albert*, 5 Mont. 577; 51 Am. Rep. 86; *Beyer v. Beyer*, 50 Wis. 254; 36 Am. Rep. 848; *Poor v. Poor*, 8 N. H. 307; 29 Am. Dec.

664 A husband who, after working his pregnant wife in the field, and requiring her to do as much work as himself, violently seizes her, and cursing her, drives her and her baby away from home, is guilty of legal cruelty entitling her to a divorce, although no other act of violence is shown: *Hulker v. Hulker*, 64 Tex. 1. While a single act of violence by one spouse toward the other is seldom ground for divorce on the ground of cruelty, two such acts always furnish ground for divorce, whether they are inflicted within a short or long period of time, especially when they are of such a nature as to give ground for the inference that they may be repeated and render life, limb, or health precarious and dangerous: *Campbell v. Campbell*, 27 Ill. App. 309; *Sharp v. Sharp*, 16 Ill. App. 348; *Farnham v. Farnham*, 73 Ill. 497; *Sharp v. Sharp*, 116 Ill. 509. Two assaults by a husband upon his wife, although of not a very aggravated nature, followed by violent and abusive language and indecent epithets, and conduct terrifying to her and their children, is cruelty for which she may have a divorce: *Day v. Day*, 56 N. H. 316; *Farnham v. Farnham*, 73 Ill. 497.

Cruelty Without Violence.—The great majority of the cases hold that actual violence on the part of one spouse toward the other is not necessary to constitute legal cruelty. Any conduct on the part of one which furnishes reasonable apprehension that the continuance of the cohabitation would be attended with bodily harm to the other is cruelty authorizing divorce: *Smedley v. Smedley*, 30 Ala. 714; *Freeman v. Freeman*, 31 Wis. 235; *Morris v. Morris*, 14 Cal. 76; 73 Am. Dec. 615; *Sylvis v. Sylvis*, 11 Colo. 319; *Graecen v. Graecen*, 2 N. J. Eq. 459; *Black v. Black*, 30 N. J. Eq. 215. An attempt to injure the person of a wife is not necessary to constitute inhuman treatment authorizing a divorce. Acts which endanger her life by destroying her health and peace of mind constitute legal cruelty: *Caruthers v. Caruthers*, 13 Iowa, 266; *Beebe v. Beebe*, 10 Iowa, 133; *Cole v. Cole*, 23 Iowa, 433. There may be extreme cruelty without the slightest violence. If it appears probable that the life of one of the parties will be rendered miserable by any character of misconduct on the part of the other, although no personal violence is apprehended, a divorce should be decreed: *Reed v. Reed*, 4 Nev. 305. There may be cases in which a husband, without violence, actual or threatened, may make the marriage state impossible to be endured. There may be angry words, coarse and abusive language, humiliating insults, and annoyances in all the forms that malice can suggest, which may as effectually endanger life or health as personal violence, and which must afford ground for divorce on the plea of cruelty; but that which merely wounds the feelings, without being accompanied by bodily injury or actual menace, is not legal cruelty: *Latham v. Latham*, 30 Gratt. 307; *Myers v. Myers*, 83 Va. 806. Profane, obscene, and insulting language habitually indulged toward a person of sensitive nature and refined feelings may amount to legal cruelty: *Briggs v. Briggs*, 20 Mich. 34. But this generally would be more readily recognized when used by the husband to the wife, than when by the wife to

the husband: *Bennett v. Bennett*, 24 Mich. 482; *Goodman v. Goodman*, 28 Mich. 417.

Mental anguish, wounded feelings, constantly aggravated by repeated insults and neglect, are as bad as actual bruises of the person, and that which produces the one is not more cruel than that which produces the other: *Glass v. Wynn*, 76 Ga. 319. Cruelty may be extreme without blows, and arises where the life of the complainant has been menaced, and where there has been harsh treatment and neglect tending to show that cohabitation will be attended with danger to health: *Harratt v. Harratt*, 7 N. H. 196; 26 Am. Dec. 730; *Rosenfeld v. Rosenfeld*, 21 Colo. 16. Abuse, without personal violence, which causes mental suffering and thus produces ill-health, rendering cohabitation physically unsafe, is legal cruelty and ground for divorce: *Jones v. Jones*, 62 N. H. 463; *Marks v. Marks*, 62 Minn. 212; *Sylvia v. Sylvia*, 11 Colo. 319.

Under a statute authorizing divorce for treatment injuring health or endangering reason, any conduct by one of the spouses affecting the other physically or mentally is cruel treatment, without regard to the intent of such behavior: *Robinson v. Robinson*, 66 N. H. 600; 49 Am. St. Rep. 662. Indignities offered by a husband to the person of his wife, such as to render her condition intolerable and life burdensome, and thereby force her to withdraw from his house and home, constitute cruel and barbarous treatment, though they do not endanger her life: *Melvin v. Melvin*, 130 Pa. St. 6. The indignities to the person mentioned in the statute as the cause for divorce need not consist of personal violence. They may be unmerited reproach, rudeness, contempt, studied neglect, open insult, and many other things habitually and systematically pursued rendering life intolerable. Nor is it necessary that the complaining party be entirely blameless: *Haley v. Haley*, 44 Ark. 429.

The following rule accurately states the law as it exists at the present time: "At the common law, to authorize a court to proceed to a separation on the grounds of cruelty, there must have been either actual violence committed, which endangered life, limb, or health, or there must have been a reasonable apprehension of such violence. The element of mental suffering, distress, or injury, unaccompanied by violence or an apprehension of violence, was entirely excluded. The doctrine is now established that, without physical violence, acts or conduct which, operating upon the mind, and through the mind upon the physical system, produce bodily hurt, may constitute cause for divorce." Such conduct operating through the mental faculties must produce injury to the physical system or bodily hurt in fact, or at least give rise to a reasonable apprehension of such result. It must operate upon the husband or wife while living in the marriage relation in the proper discharge of the duties of that relation and without fault on the part of the party complaining. Such conduct must render cohabitation intolerable, and destroy the concord, harmony, and affections of the parties for each other, and render unsafe the actual existence of the marital relations: *Beach v. Beach*, 4 Oklahoma, 359. A systematic and long-continued course of ill-treatment, without violence, may

constitute cruelty. Thus, ill-treatment by a husband, long-continued, and consisting of continual scolding and fault-finding, the use of unkind language, and of many other little acts, if studied and malicious, and the wife is sensitive, may be cruel and inhuman treatment, if it has a serious effect upon her health, or causes her great mental suffering, but to be ground for divorce the effect on her must be of a serious character: *Marks v. Marks*, 56 Minn. 464; 45 Am. St. Rep. 466; *Marks v. Marks*, 62 Minn. 212; *Jelineau v. Jelineau*, 2 Desaus. 45; *Kinsey v. Kinsey*, 90 Va. 16; *Sheffield v. Sheffield*, 3 Tex. 79; *Thomas v. Thomas*, 2 Cold. 123. Persistently harsh, cruel, abusive, and inhuman treatment is legal cruelty for which a divorce may be granted, especially when such conduct is occasionally characterized by acts of personal violence: *Johns v. Johns*, 57 Miss. 530; *Payne v. Payne*, 4 Humph. 499; *Sackrider v. Sackrider*, 60 Iowa, 397; *Douglass v. Douglass*, 81 Iowa, 258; *Kinsey v. Kinsey*, 90 Va. 16. Any continued ill-treatment by a husband, calculated to affect the mind of his wife, so as to endanger her health, or which involves by natural consequences a permanently injurious and prejudicial effect on her health, perilous to life, is sufficient to constitute cruel and inhuman treatment: *Aitchison v. Aitchison*, 99 Iowa, 93. A husband who, since the commencement of his married life, has continually been in the habit of grossly abusing his wife during her pregnancy, and of applying to her and to members of her family and relatives vile, profane, and obscene language, is guilty of cruel and inhuman treatment: *Wolfe v. Wolfe*, 102 Cal. 433-436. The studied and continued application of offensive and unendurable epithets by a husband to his wife, which are calculated to degrade her, and are used in the presence of the members of her family, is cause for divorce: *Dunlap v. Dunlap*, 49 La. Ann. 1696. A neglectful, ill-tempered, and drunken husband, who subjects his wife to a course of most abusive treatment, and repeatedly threatens to kill her, and manifests a purpose to execute his threats, is guilty of cruelty and indignities to the wife entitling her to divorce: *Mason v. Mason*, 131 Pa. St. 161. It is extreme cruelty for a husband to wantonly neglect his wife in her critical illness and to address her at such times in harsh and brutal language: *Hoyt v. Hoyt*, 56 Mich. 50. If a wife, against her husband's objection, goes to her parents' home to be confined, and her husband, who at first refuses, but finally goes to see her subsequent to her confinement, informs her that if she does not return before the next week he will "advertise" her desertion, charges her with incest with her father, and claims that her child is by her father, and upon her failure to so return, does "advertise" her as deserting him, is guilty of extreme cruelty warranting a divorce: *Palmer v. Palmer*, 45 Mich. 150; 40 Am. Rep. 461. It is extreme cruelty to expel a wife and young stepdaughter and make their separation a condition of taking back the wife: *Friend v. Friend*, 53 Mich. 543; 51 Am. Rep. 161. When a husband, though able, neglects to care for and support his wife, bestows opprobrious epithets upon her, subjects her to personal indignities, and allows his sons to ill-treat her in his presence without rebuke, he is guilty

of cruelty, although she is not wholly blameless: *Hacker v. Hacker*, 90 Wis. 325. Where a husband, during ten months of the first year of his married life, is in the habit of cursing his wife, using vile and indecent names toward her in the presence of her children, flogging one of them, frequently threatening to drive them away, and finally driving his wife from the house, telling her that he could live with her no longer, he is guilty of cruel treatment warranting her in obtaining a divorce: *Whitacre v. Whitacre*, 64 Mich. 232.

A husband who forces his wife to do more work than she is capable of performing in her state of delicate health, thus compelling her to leave him, is guilty of extreme cruelty: *De Zwaan v. De Zwaan*, 91 Mich. 279.

The practice of Christian Science as a doctor, by a wife, who believes it to be her duty, is cruelty as against a husband who is abnormally sensitive: *Robinson v. Robinson*, 66 N. H. 600; 49 Am. St. Rep. 632.

A husband who, disregarding his wife's protests, continues to keep at the family domicile other persons for whose support he is not liable, and who habitually treat her with disrespect, apply coarse and degrading epithets to her, and so conduct themselves toward her as to justify a reasonable apprehension of danger to her person from their violence, while she is entirely blameless, must be held to have adopted such conduct of the third parties mentioned as his own, which renders him guilty of cruel and inhuman treatment, justifying a divorce for the wife: *Hall v. Hall*, 9 Or. 452.

Divorce on the ground of extreme cruelty will be denied where there is no actual bodily violence, unless the treatment, abuse, neglect, or bad conduct is such as impairs the health, or renders cohabitation intolerable or unsafe, or unless there are threats of ill-treatment of such flagrant kind as to cause reasonable and abiding apprehension of bodily violence, so as to render it impracticable to discharge marital duties. Habitual indulgence of a violent and ungovernable temper is not ground for divorce, unless such indulgence has the effect of rendering the life of the complainant oppressive and an intolerable burden, and makes it impracticable to discharge marital duties. Occasional outbursts of passion, petulance, readiness to anger, frequent and unreasonable complaints made in a loud voiced, boisterous manner, and well calculated to render the relations between the parties unpleasant and disagreeable and unhappy, do not furnish grounds for divorce, unless they really affect the health of the complaining party: *Palmer v. Palmer*, 26 Fla. 215. It has often been held that mere rudeness of manners or language, petulance, austerity of temper, occasional sallies of passion, or any conduct which simply wounds the sensibilities or feelings, and causes grief and domestic unhappiness, if not accompanied by personal violence or threats thereof, do not constitute legal cruelty warranting divorce: *Gleason v. Gleason*, 16 Neb. 15; *Maben v. Maben*, 72 Iowa, 658; *Wood v. Wood*, 80 Ala. 254; *Poor v. Poor*, 8 N. H. 307; 29 Am. Dec. 664; *Turbitt v. Turbitt*, 21 Ill. 438; *Minde v. Minde*, 65 Mich. 633; *Whaley v. Wha-*

ley, 68 Iowa, 647; Ennis v. Ennis, 92 Iowa, 107; Waldron v. Waldron, 85 Cal. 251-257. A continual succession of petty annoyances, complaints, fault-finding, and disparagement of his common sense, taste, and judgment do not constitute extreme cruelty to a husband authorizing him to obtain a divorce: Johnson v. Johnson, 49 Mich. 639. And this is true although the conduct of the wife injuriously affects the husband's health, where such conduct is not intended to inflict harm: Freeborn v. Freeborn, 168 Mass. 50. Unkind treatment, threats of personal violence, abusive language and opprobrious epithets, without personal violence, or injury to the health of the complainant, do not constitute such cruelty as authorizes a divorce: Vignos v. Vignos, 15 Ill. 186; Shell v. Shell, 2 Sneed, 716; Hill v. Hill, 2 Mass. 150. Abusive language by a husband, accompanied by his act of placing his hand on his wife's shoulder and requesting her to leave the room, is not legal cruelty: Donald v. Donald, 21 Fla. 571. And the fact that a husband has been imprudent, unreasonable, or jealous, without any malignant desire to annoy or harass his wife, is not necessarily cruelty: Boon v. Boon, 12 Or. 437.

Excessive Intercourse, or Refusal of Intercourse.—Gross abuse of marital rights in requiring the complaining spouse to submit to excessive sexual intercourse, resulting in injury or suffering, or when it may give rise to a reasonable apprehension that such a result will follow, may constitute legal cruelty and justify the complaining party in obtaining a divorce: Moores v. Moores, 16 N. J. Eq. 275, 279; Melvin v. Melvin, 58 N. H. 569; 42 Am. Rep. 605; Grant v. Grant, 53 Minn. 181. Excessive sexual intercourse demanded and persisted in by a husband in a rash, rough, and unreasonable manner, when he knows that the condition of his wife is such that it will inflict suffering and injury upon her, and that she cannot properly and safely accede to his wishes, renders him guilty of such intolerable cruelty as entitles her to a divorce: Mayhew v. Mayhew, 61 Conn. 233; 29 Am. St. Rep. 195. And this is especially true if from any reason she is in ill-health or in a delicate condition mentally or physically: English v. English, 27 N. J. Eq. 579; Walsh v. Walsh, 61 Mich. 554. It has been held, however, that the compulsory participation by a wife in excessive sexual intercourse does not amount to cruelty, unless the persistence of the husband is against her will, he knowing that her bodily health will suffer therefrom: Youngs v. Youngs, 33 Ill. App. 223; affirmed on other grounds, 130 Ill. 230; 17 Am. St. Rep. §13. The mere refusal of a husband to have sexual intercourse with his wife is not cruel or inhuman treatment, provided that no mental or bodily injury and no impairment of her health results from such refusal: Schoessow v. Schoessow, 83 Wis. 553. And the utter denial of a wife to have sexual intercourse with her husband is not cruel or abusive treatment entitling the husband to a divorce: Cowles v. Cowles, 112 Mass. 298. Where a husband conveys to his wife his homestead and homestead furniture, constituting the bulk of his property, after which she refuses to cohabit with him, though allowing him to keep a room in the house, but finally driving him therefrom, she is

guilty of extreme cruelty which entitles him to a divorce: *Menzer v. Menzer*, 83 Mich. 319; 21 Am. St. Rep. 605.

Charges of Adultery or Unchastity.—The rule is well settled that if either a husband or a wife falsely accuses the other of adultery, such accusation is cruel and inhuman treatment within the meaning of the divorce laws: *Smith v. Smith*, 8 Or. 100. Under the rule that to obtain a divorce on the ground of inhuman treatment there need be no act of violence, such charges of infidelity, made maliciously and without probable cause, are sufficient to sustain the action, the only requirement being that such charges must be made falsely and maliciously: *Kennedy v. Kennedy*, 60 How. Pr. 151. Thus it has been maintained in numerous cases that one or many malicious and groundless charges of adultery, made by a husband against his wife, may constitute cruel and inhuman treatment within the meaning of the divorce law: *Wagner v. Wagner*, 36 Minn. 239; *Powelson v. Powelson*, 22 Cal. 358; *Carpenter v. Carpenter*, 30 Kan. 712; 46 Am. Rep. 108; *Palmer v. Palmer*, 45 Mich. 150; 40 Am. Rep. 461; *Lee v. Lee*, 3 Wash. 236; *Coble v. Coble*, 2 Jones Eq. 392; *Pinkard v. Pinkard*, 14 Tex. 356; 65 Am. Dec. 129; *Graft v. Graft*, 76 Ind. 136; *McMahan v. McMahan*, 9 Or. 525; *Williams v. Williams*, 67 Tex. 198; *Jones v. Jones*, 60 Tex. 451; *Eggerth v. Eggerth*, 15 Or. 626; *Herberger v. Herberger*, 16 Or. 327; *Bahn v. Bahn*, 62 Tex. 518; 50 Am. Rep. 539; *Kennedy v. Kennedy*, 73 N. Y. 369; *Clinton v. Clinton*, 60 Mo. App. 296; *Holyoke v. Holyoke*, 78 Me. 404; *Wheeler v. Wheeler*, 53 Iowa, 511; 36 Am. Rep. 240; *Lyle v. Lyle*, 86 Tenn. 372; *Cooper v. Cooper*, 78 Mich. 316; *Mason v. Mason* 131 Pa. St. 161; *Doolittle v. Doolittle*, 78 Iowa, 691. Extreme and protracted suffering may be produced primarily operating upon the mind alone by false charges of adultery maliciously made by a husband against his wife, and the injury to health thus caused, rendering the continuance of the marriage relation burdensome and intolerable, constitutes extreme cruelty: *Ward v. Ward*, 103 Ill. 477; *Powelson v. Powelson*, 22 Cal. 358. It is not necessary that such false charges should be uttered in public to constitute them cruelty. It is sufficient if they are addressed to the other spouse in the presence of a third person, or spoken to other persons in the absence of the party affected thereby: *Cass v. Cass*, 34 La. Ann. 611; *Jones v. Jones*, 60 Tex. 451; *Crow v. Crow*, 29 Or. 392; *Graft v. Graft*, 76 Ind. 136.

It is cruelty for a husband to falsely accuse his wife of being infected with a venereal disease: *McMahan v. McMahan*, 9 Or. 525; or to persist in charging her with incest without cause and continually keeping a watch upon her: *Smith v. Smith*. 40 N. J. Eq. 566. And it is extreme cruelty to a wife for her husband to persistently and openly consort with, and express his preference for, loose and lewd females: *McClung v. McClung*, 40 Mich. 493; *Holmes v. Holmes*, 50 La. Ann. 000; *Penningroth v. Penningroth*, 72 Mo. App. 329.

It is extreme cruelty warranting a divorce for a wife publicly and falsely to accuse her husband of adultery: *Kelly v. Kelly*, 18 Nev. 49; 51 Am. Rep. 733. But for the mere charge of adultery made by a wife against her husband, though repeated and ground-

less, to constitute extreme or legal cruelty it must be clearly shown that the making of such charge has caused, or may produce, mental suffering or anguish beyond the ordinary effect likely to be produced, and resulting in injury to his health. Otherwise the divorce must be denied: *McAlister v. McAlister*, 71 Tex. 695. The same court which maintains this rule has, however, repeatedly held that a single deliberate act of the husband in falsely and publicly charging his wife with being a prostitute or with adultery or unchastity may be cause for granting her a divorce: *Jones v. Jones*, 60 Tex. 457; *Bahn v. Bahn*, 62 Tex. 518; 50 Am. Rep. 539. It is extreme cruelty justifying divorce for a wife to send anonymous letters to her husband's clerk and to the newspapers, falsely charging her husband with criminal intimacy with such clerk's wife: *Carpenter v. Carpenter*, 30 Kan. 712; 46 Am. Rep. 108. The same result follows when a wife causelessly humiliates her husband, and endangers his means of subsistence by habitually, persistently, and publicly accusing him of infamous conduct in violation of his marriage obligations, and by applying vile and opprobrious epithets to him and dogging him and setting others to spy out his movements, until, by inordinate and indecent exhibitions of jealousy and the criminal indulgence of unworthy and unfounded suspicions, she has practically destroyed the decencies and purposes of the marriage relation: *Whitmore v. Whitmore*, 49 Mich. 417.

Privity of a wife with a conspiracy to induce her husband to commit adultery or to place himself in equivocal relations with a woman not his wife, so as to bring an action for divorce upon the evidence so obtained, constitutes cruelty sufficient to sustain his action for divorce: *Uhlmann v. Uhlmann*, 17 Abb. N. C. 236.

To support a charge of extreme cruelty in an action for divorce when words alone are relied upon as constituting such cruelty, it must appear that the words were uttered without justifiable cause and for the purpose of inflicting pain. When they are uttered merely as a complaint against apparent misconduct, as the result of natural feelings excited by misconduct, they are insufficient to constitute legal cruelty: *Masterman v. Masterman*, 58 Kan. 748. While the use of language by a husband imputing unchastity to his wife may, under certain circumstances, amount to legal cruelty for which a divorce may be granted, yet when such language is used under circumstances which clearly justify the truth of the charge, and are brought about by the apparent conduct of a guilty wife, it is not cruelty justifying divorce: *Coulthard v. Coulthard*, 91 Iowa, 742. Thus if, in an action by a wife for divorce against her husband on the ground of his cruelty in publicly accusing her of unchastity and infidelity, it appears that his conduct and charges were stimulated by jealousy and by her apparent misconduct with other men, such charges will not amount to cruelty, especially when it is not shown that her life or health has been endangered or impaired by such conduct on his part: *Evans v. Evans*, 82 Iowa, 462; *Blurock v. Blurock*, 4 Wash. 495; *McKee v. McKee*, 77 Iowa, 464; *Gilbertson v. Gilbertson*, 78 Iowa, 755.

When the cruelty complained of consists of accusations of infidelity or other violations of marital relations made by a wife against her husband, though they may not have been true, yet if they were not made maliciously or through hatred or spite, but in good faith, with reasonable cause for believing them true, and for the purpose of inducing her husband to abandon his supposed course of wrongdoing and to return to a proper observation of his marital relations, they do not constitute cruelty justifying divorce: *Beach v. Beach*, 4 Oklahoma, 359; *Ashton v. Ashton*, 48 La. Ann. 1194; *Penningroth v. Penningroth*, 72 Mo. App. 329. It is decided in *Beach v. Beach*, 4 Oklahoma, 359, that charges of adultery, or unchastity to constitute legal cruelty, must operate upon the husband or wife while living as husband and wife and prior to their separation, and we think this is the better rule, although it is denied in *Smith v. Smith*, 8 Or. 100.

The Communication of Venereal Disease by a husband to his wife or by a wife to her husband is extreme cruelty warranting a divorce for the injured and innocent party, provided such disease is knowingly and willfully communicated: *Anonymous*, 17 Abb. N. C. 231; *Canfield v. Canfield*, 34 Mich. 519; *Cook v. Cook*, 32 N. J. Eq. 475; *Morehouse v. Morehouse*, 70 Conn. 420. Thus, where a husband, who has had the same venereal disease twice before marriage, and soon after marriage consorts with a lewd woman while his physical condition is such as to render it extremely probable that he was thus again affected, and upon having intercourse with his wife he communicates such venereal disease to her, he is guilty of extreme cruelty: *Cook v. Cook*, 32 N. J. Eq. 475. And if a husband, who is aware that he has an infectious venereal disease, solicits and has sexual intercourse with his wife, who is ignorant of his condition, and who thereby contracts the disease and suffers from it for months, until he, still having such disease, solicits such intercourse and is refused, and then attempts to have intercourse by force, whereupon she becomes seriously and dangerously ill, he is guilty of intolerable cruelty warranting a divorce: *Morehouse v. Morehouse*, 70 Conn. 420.

Violence by Insane Spouse not Cruelty.—Cruel, violent, or inhuman treatment of a wife by her husband or of a husband by his wife while insane, and as a result of such insanity, does not entitle the party thereby made to suffer to a divorce on the ground of cruelty: *Tiffany v. Tiffany*, 84 Iowa, 122; *Wertz v. Wertz*, 43 Iowa, 534; *Youngs v. Youngs*, 130 Ill. 230; 17 Am. St. Rep. 313; *Cohn v. Cohn*, 85 Cal. 108.

Miscellaneous.—Adultery by one of the parties to a marriage, while it may constitute extreme cruelty in a popular sense, does not in a legal sense constitute such cruelty: *Haskell v. Haskell*, 54 Cal. 262; *Cline v. Cline*, 10 Or. 474; *Miller v. Miller*, 78 N. C. 102. The fact that a wife has seen her husband have carnal knowledge of a cow is such cruel and inhuman treatment on his part, endangering her life and health, as to justify the wife in obtaining a divorce on the ground of cruelty: *Prather v. Prather*, 99 Iowa, 393. The habitual use of opiates, rendering the user callous, reckless,

untruthful, and stupid, causing physical prostration, and destroying all the objects of the marital relation, while causing the other spouse's condition to be intolerable, is such an indignity as to constitute cruelty and justify divorce on that ground: *Dawson v. Dawson*, 23 Mo. App. 169.

GUETZKOW BROTHERS COMPANY v. BREESE.

[96 WISCONSIN, 591.]

DURESS OF GOODS.—A lessee who, in compliance with the terms of his lease, has taken out insurance policies, covering the lessor's interests in the property, as well as his own, and who is in a position where he must obtain insurance money at once to enable him to go on with his business and fulfill outstanding contracts or suffer great loss, and who pays to the lessor under protest a sum which he does not owe, to induce such lessor to join in executing proofs of loss and in indorsing drafts without which the lessee cannot obtain his insurance money, the policy being payable to both of the parties as their interests shall appear, may recover the amount so paid on the ground that it was paid under duress.

CONTRACTS.—AN AGREEMENT TO INSURE machinery and buildings on the leased premises for a certain sum, payable to the lessor as his interest shall appear, is satisfied by procuring insurance on the buildings and machinery for more than the sum required, although the machinery belongs to the lessee, the lessor having a lien thereon for unpaid rent. In case of loss to the building, the lessor can recover only the amount for which it is insured, though that is less than its full value.

Winkler, Flanders, Smith, Bottum & Vilas and H. K. Gibson,
for the appellants.

N. S. Murphey, for the respondent.

⁵⁹⁷ WINSLOW, J. We entertain no doubt that under the facts found by the circuit court there was a case of duress of ⁵⁹⁸ goods. The case was this: The plaintiff could not obtain the insurance money due it unless the defendants joined in executing the proofs of loss and in indorsing the drafts. The defendants refused to do these things unless the plaintiff would pay them \$666.74, which it did not owe. The plaintiff was in a position where it must obtain its insurance money at once in order to go on with its business and fulfill valuable outstanding contracts, or it would suffer great loss. Under these circumstances, it submitted under protest to the unjust demand in order to obtain its own money from the insurance company. This makes a case of legal duress of goods: *Vyne v. Glenn*, 41 Mich. 112; *Corkle v. Maxwell*, 3 Blatchf. 413; *Scholey v. Mumford*, 60 N. Y. 498; *Cobb v. Charter*, 32 Conn. 358; 87 Am. Dec. 178.

The question is, therefore, whether the findings of fact are sustained by the evidence. We have carefully read the evidence, and are satisfied that as to the greater part of the facts found the evidence is amply sufficient to sustain the findings. Among these facts so sustained by the evidence are the following: That the plaintiff's losses by the fire were over \$14,000; that the plaintiff was unable to obtain the money from the insurance companies without the signature of the defendants to the proofs and checks; that the defendants refused to sign until the plaintiff had contracted to pay \$666.74 out of the insurance moneys to the defendants; that the plaintiff would have suffered great hardship and injury in its business if it had been deprived of its insurance moneys for any considerable time; and that the plaintiff actually paid the sum of \$506.74 upon said forced agreement. The only other fact remaining necessary to be found in order to establish a good case is the fact that the claim of the defendants against the plaintiff for \$666.74 was an unjust and unfounded claim. This is, of course, a vital fact, and if it did not exist—i. e., if the claim was in fact a valid one—the action certainly will not lie, because it is of the gist of the action that the money extorted be upon a groundless claim.

599 It is vigorously claimed that the evidence shows the claim of the defendants to receive \$4,000 for the building was a valid one. This contention is based upon the agreement to insure contained in the lease, which, the defendants claim, has not been carried out. This agreement was, in effect, that the plaintiff would keep the buildings and machinery insured for not less than \$6,200, payable, in case of loss, to defendants, as their interest may appear. No amount is specified which should be put upon any one building or upon the machinery. That was apparently left to the judgment of the plaintiff. Now, was this agreement fulfilled? If it was, then the defendants had no just claim for any more than the amount for which the building destroyed was insured. The evidence shows that all the policies were joint policies, and there seems no doubt but that this fact was known to the defendants. They were payable to the plaintiff and to the defendants as their interest might appear. There was undisputedly \$3,333.26 of the insurance upon the main building which was destroyed, \$833.50 upon the engine and boiler house, and \$3,333.26 upon the engine and boiler and connections; thus making about \$7,500 in gross upon the buildings and engine and boiler. This sum was in fact all payable to the defendants if their interest in the two buildings and the engine

and boiler amounted to that sum. It will be remembered that, though the plaintiff furnished the engine and boiler, the lease, which was executed by both parties under seal, provided for a lien in favor of the defendants upon the boiler and engine for all unpaid rent, so that the defendants might, in fact, have a large interest by way of lien upon that part of the machinery. It appears by the evidence that at the time of this fire there was nearly \$1,900 of unpaid rent. Under the lien provision of the lease, this sum seems to have been a lien upon the engine and boiler, and, had they been destroyed, the defendants would have been protected to that amount in addition to the protection afforded by the insurance ⁶⁰⁰ on the buildings. Certain it is that at the time of this fire there was \$7,500 in gross of insurance upon the defendants' two buildings and upon the engine and boiler, which was payable to the defendants as their interest might appear, and this, we think, satisfies the agreement to insure contained in the lease. The result is, that the defendants had no valid claim for any of the insurance moneys save the amount for which the building was insured, namely, \$3,333.26, and the judgment must be affirmed.

By the Court. Judgment affirmed.

DURESS—RECOVERY OF MONEY PAID UNDER.—Money paid to one not entitled thereto, under such duress as gives it the character of a compulsory payment, may be recovered back: Note to *Cribbs v. Sowle*, 24 Am. St. Rep. 173. To constitute duress, it is sufficient if the will be constrained by the unlawful presentation of a choice between comparative evils; as inconvenience and loss by the detention of the property, or payment of an exorbitant demand: *Alston v. Durant*, 2 Strob. 257; 49 Am. Dec. 596; *Adams v. Schiffer*, 11 Colo. 15; 7 Am. St. Rep. 202. See monographic note to *Hatter v. Greenlee*, 28 Am. Dec. 374-378, as to what constitutes duress; *Joanin v. Ogilvie*, 49 Minn. 564; 32 Am. St. Rep. 581, and note.

BERGERON v. HOBBS.

[96 WISCONSIN, 641.]

CORPORATIONS—FILING ARTICLES.—The mere recording of the articles of incorporation of a corporation with the certificate of the election of officers, without the intention or fact of the papers themselves remaining in the office, is not a sufficient filing to complete the organization of the corporation or vest it with corporate powers.

CORPORATIONS — DEFECTIVE ORGANIZATION — INDIVIDUAL LIABILITY.—If an attempt to organize a corporation fails by omission of some substantial step or proceeding required by

statute, its members or stockholders are liable as partners for its acts and contracts.

CORPORATIONS — DEFECTIVE ORGANIZATION — COLLATERAL ATTACK.—The filing of articles of incorporation required by statute is a condition precedent to the vesting of corporate powers. Until this condition is complied with, the corporation cannot act under color of legal right. It is not a corporation de facto, and its right to act as a corporation is subject to collateral attack.

CORPORATIONS—DEFECTIVE ORGANIZATION—INDIVIDUAL LIABILITY.—The filing of articles of incorporation required by statute is a condition precedent to the vesting of corporate powers. Until this condition is complied with the association is not a corporation de facto, although it has carried on business under supposed authority to act as a body corporate in entire good faith. In such case, the members or stockholders are individually liable for its debts and contracts.

G. P. Rossman, for the appellants.

W. H. Packard and A. W. McLeod, for the respondent.

642 **NEWMAN, J.** There are two questions raised on this appeal: 1. Was the mere recording of the articles of incorporation, with the certificate of the election of officers, without the intention or fact of the papers themselves remaining in the office, a sufficient compliance with the statute, so that the organization of the corporation became complete, as upon a 643 proper filing of the papers themselves? and 2. If the recording was not sufficient for that purpose, are the defendants liable to the plaintiff only as a de facto corporation, or are they liable as co-partners?

1. The statute (Rev. Stats., sec. 1460) provides that, upon the filing of "a certificate of organization, . . . with a copy of the constitution," in the office of the register of deeds of the county, "such society shall have all the powers of a corporation necessary to promote the objects thereof." It cannot be doubted that the filing of the proper papers in the proper office is made, by the statute, a condition precedent to the vesting of corporate powers. The court may not be able to clearly define the respect wherein the mere recording and removal of the papers from the office fails to serve the full purpose which the legislature intended to accomplish by the filing of them. The legislature, no doubt, had good and sufficient reasons for its choice of means to promote its purpose. For the court it is not a question of equivalents. A literal filing of the papers is necessary because it is so written in the law. The term "filing" and the verb "to file," as related to this subject, include the idea that the paper is to remain in its proper order on file in the office. A paper is said to be filed

when it is delivered to the proper officer, and by him received, to be kept on file: Bouvier's Law Dictionary. The statute is plain and easy of observance. Valuable rights and exemption from personal liability are to be secured by its observance. It is no undue severity to require its strict observance. The defendants had not observed it, and had not secured corporate powers.

2. Had the defendants secured immunity from individual liability? No doubt, as a general rule, where an attempt to organize a corporation fails by omission of some substantial step or proceeding required by the statute, its members or stockholders are liable as partners for its acts and contracts: Beach on Private Corporations, secs. 16, 162; 1 Thompson on Corporations, secs. 239, 416, ~~644~~ 417. But the defendants' contention is, that they are not within this rule, because they are at least *de facto* a corporation, and their right to be a corporation cannot be inquired into in a collateral action, but only in a direct action for that purpose by the state. The infirmity of the defendants' contention is in the assumption that they are *de facto* a corporation. In order to secure this immunity from inquiry into its right to be a corporation in a collateral action, its action, as a corporation, must be under a color, at least, of right. It is immaterial that they have carried on business under the supposed authority to act as a body corporate, in entire good faith. If they had not color of legal right, they have obtained no immunity from individual liability for the debts of the supposed corporation. Until the articles of incorporation are filed in the office of the register of deeds of the county, there is no color of legal right to act as a corporation. The filing of such paper is a condition precedent to the right to so act. So long as an act, required as a condition precedent, remains undone, no immunity from individual liability is secured: 1 Thompson on Corporations, secs. 226, 508.

The defendants are not a corporation either *de jure* or *de facto*, but are liable for the plaintiff's claim as partners. It was not necessary to prove a copartnership by evidence. That was established by implication of law. Nor was it necessary to prove that the debt was unpaid. There was no presumption that it had been paid to be rebutted. The judgment of the circuit court is right, and must be affirmed.

By the Court. The judgment of the circuit court is affirmed.

MR. JUSTICE MARSHALL, dissenting, said that: "With the decision that the defendants failed to comply with all the conditions

precedent to the corporate existence of the association I concur, but from the decision that because of such failure such association was not a corporation de facto I respectfully dissent. Hence dissent from the conclusion reached that the defendants are personally liable to plaintiff, and that the judgment should be affirmed, but, on the contrary, hold that it should be reversed. . . . If we hold with Missouri, Arkansas, and some other states, that unless all the steps necessary to the creation of the corporation have been taken there is no corporate existence, and that the members of the association are personally liable, we, in effect, say that it is not sufficient to enable such members to escape personal liability to show that their organization is a corporation de facto; that nothing short of a corporation de jure will do. But if we adopt the growing doctrine, supported, as I shall show, by the overwhelming weight of authority in this country, that if a person contracts with a de facto corporation, the members of the latter and such person believing, in good faith, in its legal existence, such members cannot be held personally liable, then we concede, necessarily, that it is not essential to freedom from such liability that all the statutory requisites to the existence of a corporation be complied with, because, when that is done, the organization, obviously, is not a corporation de facto only; it is a corporation de jure. This is too plain to admit of serious discussion. A few authorities of the multitude that exist on the question under discussion will be referred to." He then proceeded to show that the opinion of the majority of the judges was wholly irreconcilable with *Cochran v. Arnold*, 58 Pa. St. 399; *Hamilton v. C. M. & P. R. Co.*, 144 Pa. St. 34; *Spahr v. Farmers' Bank*, 94 Pa. St. 429; *Guckert v. Hacke*, 159 Pa. St. 303; *Planters' etc. Bank v. Padgett*, 69 Ga. 159; *Gartside Coal Co. v. Maxwell*, 22 Fed. Rep. 197; *Stafford Nat. Bank v. Palmer*, 47 Conn. 443; *Eaton v. Walker*, 76 Mich. 579; *Merchants' etc. Bank v. Stone*, 38 Mich. 779; *Haas v. Bank of Commerce*, 41 Neb. 757; 17 Am. & Eng. Ency. of Law, 886; 4 Thompson on Corporations, sec. 5275; Morawetz on Private Corporations, 1st ed., secs. 141, 142; Angell and Ames on Corporations, sec. 635; Cook on Stock and Stockholders, sec. 637. Further proceeding he said: "After carefully examining such authorities and the reasoning on which the doctrine discussed is based, I am unable to understand how any other conclusion can be reached than that a decision cannot be made that plaintiff in this case can attack the existence of the agricultural association as a corporation, if it were such de facto, without holding in direct conflict with the decision in *John V. Farwell Co. v. Wolf*, 96 Wis. 10; ante, p. 22, which is supported by the highest authorities in this country, and which the court certainly would not wish to question. True, there are some authorities still holding to the ancient doctrine that anyone can challenge the existence of a corporation or the legality of its acts, but the trend of modern authority is to fence in, within constantly narrowing limits, the cases where private persons can attack either the existence of a corporation or the legality of its exercise of pow-

ers; and, in the humble opinion of the writer, the theory that a private person can so attack a corporation will disappear altogether in the near future, either by the courts that adhere to the ancient doctrine voluntarily changing their rule on the subject, or by its being changed by statute." The judge next considered the question whether the association had, notwithstanding the defects in its organization, become a corporation de facto, and maintained that this question must be answered in the affirmative: Citing *Evenson v. Ellingson*, 67 Wis. 634; *Methodist etc. Church v. Pickett*, 19 N. Y. 482; *United States Bank v. Stearns*, 15 Wend. 314; *Trustees of Vernon Soc. v. Hills*, 6 Cow. 23; 16 Am. Dec. 429; *Brouwer v. Appleby*, 1 Sand. 158; *Vanneman v. Young*, 52 N. J. L. 403; *Georgia etc. Ry. Co. v. Mercantile etc. Co.*, 94 Ga. 309; 47 Am. St. Rep. 153. "The very meaning of the term 'de facto' indicates that nothing more is necessary to the existence of a de facto corporation than the exercise of corporate powers in good faith. Corporation de facto—that is, a corporation from the fact that it is acting as such under color of right in good faith. The existence of the law, and some attempt to comply with it, are essential, because without them there can be no assumption of the right to corporate existence in good faith. Persons cannot be said to honestly claim the right to corporate existence, in the absence of any law authorizing the organization, or in the absence of some honest attempt to comply with such law, if one exists. The law and such attempt, or user of the franchise, whatever mistakes may be made in so doing—such as the filing of articles of organization when they are required to be recorded, or the recording of articles when they are required to be filed, or the filing of such articles in the wrong office, or any other of the numerous mistakes that might be made—make a corporation good everywhere, in all courts and places, till successfully challenged by the state. There is hardly any end of authority, all in harmony on this subject, but we content ourselves by referring to the following additional cases: *Haas v. Bank of Commerce*, 41 Neb. 754; *East Norway Lake etc. Church v. Froislie*, 37 Minn. 447; *Snider's Sons' Co. v. Troy*, 91 Ala. 224; 24 Am. St. Rep. 887; *Stout v. Zulick*, 48 N. J. L. 601; *McCarthy v. Lavasche*, 89 Ill. 270; 31 Am. Rep. 83; *Hudson v. Green Hill Seminary Corp.*, 113 Ill. 618; *St. Louis v. Shields*, 62 Mo. 247; *Central etc. Assn. v. Alabama etc. Ins. Co.*, 70 Ala. 120; *Palmer v. Lawrence*, 3 Sand. 161; *North v. State ex rel. Pate*, 107 Ind. 356. From the foregoing, I am warranted in asserting that, by well-settled principles of law, the agricultural association with whom plaintiff contracted was a de facto corporation."

CORPORATIONS DE FACTO—WHEN EXIST—LIABILITY OF MEMBERS.—Corporations de facto exist when there is a law authorizing such corporation, and when the company has made an effort, though irregular and imperfect, to organize under the law, and is transacting business in a corporate name. The stockholders in such a corporation cannot be held liable as partners, but an association of persons cannot exist as a corporation de facto unless

they can legally become a corporation de jure: *Duke v. Taylor*, 37 Fla. 64; 53 Am. St. Rep. 232, and note. Where there cannot be a corporation de jure there can be no corporation de facto: *Bradley v. Reppell*, 133 Mo. 545; 54 Am. St. Rep. 685, and note. Though persons do business as a de facto corporation, they may be held liable as individuals: *Williams v. Hewitt*, 47 La. Ann. 1076; 49 Am. St. Rep. 394, and note. A company intended to be a corporation, but which has failed to comply with the statute requiring it to file its certificate of incorporation with the secretary of state, and to pay a fee therefor, is neither a de jure nor a de facto corporation, but simply a voluntary association of individuals in the nature of a copartnership: *Jones v. Aspen Hardware Co.*, 21 Colo. 263; 52 Am. St. Rep. 220; monographic note to *Rutherford v. Hill*, 29 Am. St. Rep. 602, 603. Compare monographic note to *People v. Montecito Water Co.*, 33 Am. St. Rep. 186.

CORPORATIONS—DEFECTS IN ORGANIZATION—COLLATERAL ATTACK.—The validity of articles of incorporation cannot be inquired into incidentally and collaterally: *Pott v. Schmucker*, 84 Md. 535; 57 Am. St. Rep. 415, and note; *Boyd v. Redd*, 120 N. C. 335; 58 Am. St. Rep. 792. It is a general rule that the right of a corporation de facto to do business and to exercise corporate functions is never open to inquiry in a collateral suit: See monographic note to *People v. Montecito Water Co.*, 33 Am. St. Rep. 181. It would seem upon principle that the nature or character of the informality or defect is immaterial, provided, notwithstanding its existence, it is apparent that there was an attempt in good faith to create a corporation, and that in like good faith there has been an assumption and exercise of corporate functions: See monographic note to *People v. Montecito Water Co.*, 33 Am. St. Rep. 183.

STATE v. CIRCUIT COURT.

[97 WISCONSIN, 1.]

COURTS, CONTEMPT OF—DISPARAGING REMARKS RESPECTING THE JUDGE.—One publishing of a judge, who is a candidate for re-election, a charge that he has been corrupt and intentionally partial in certain cases, which, however, have been finally determined, may be guilty of libel of the judge, but not of contempt of court, though such publication occurs while the judge is presiding in court in the discharge of his duties, and jurors and litigants are in attendance thereon.

A CRIMINAL CONTEMPT IS ANY ACT DONE TO OBSTRUCT THE COURSE of justice or to prejudice the trial of any action or proceeding then pending in court.

COURTS—CONTEMPT.—The power of courts of superior jurisdiction to punish contempt is inherent and arises by implication from the creation of the courts. This power may be regulated, and the manner of its exercise prescribed, by statute, but it cannot be taken entirely away, nor can its sufficiency be so impaired or abridged as to leave the court without the power to compel the due respect and obedience essential to preserve its character as a judicial tribunal.

COURTS, CONTEMPT OF.—Newspaper comments on the action of a judge in cases finally decided prior to their publication cannot be considered criminal contempts.

COURTS, CONTEMPT OF—FALSE PUBLICATION.—Though a statute declares that a contempt of court may be commit-

ted by the publication of a false or grossly inaccurate report or copy of its proceedings, a commitment for contempt cannot be sustained when founded upon a charge that the accused published of the judge then presiding in court that his decisions, in certain cases before then finally determined, had been influenced by partiality and corrupt motives, if such charge does not further state that the reference thus made to the proceedings of the court was in some respect false or inaccurate.

CONTEMPT OF COURT ALLEGED TO HAVE BEEN COMMITTED IN ANSWERING AN ORDER TO SHOW CAUSE.—If matters charged against one accused of contempt of court are not punishable as such, because they did not occur in the presence of the court, the filing of an affidavit in response to an order to show cause averring the truth of the publication complained of cannot be punishable as such, because they did not occur in the presence of the court.

CONTEMPT OF COURT—PROHIBITION AS A REMEDY.—If the matters charged do not constitute a contempt of court, and it appears that immediate imprisonment is threatened, a writ of prohibition affords an adequate remedy. The accused is not obliged to wait until sentenced or imprisoned and to seek relief by habeas corpus, writ of error, or certiorari.

Prohibition seeking to prevent the further prosecution in the circuit court of Eau Claire county against Ashbaugh and Doolittle of a charge of having committed a criminal contempt of court. The charge upon which the prosecution was founded was that, in March, 1897, and while the circuit court was in session, and the Honorable W. F. Bailey, judge thereof, was presiding, he was also a candidate for his re-election; that Doolittle was a lawyer practicing in the court, and Ashbaugh was the editor of a newspaper, and both were opposed to the re-election of Judge Bailey, and one wrote, and the other published, a newspaper article charging the judge with extravagance and also with having been partial and unfair in respect to his official conduct in the trial of causes, and with being influenced by corrupt motives. The causes thus alluded to had all been heard and finally determined prior to the publication in question. On April 2, 1897, an order to show cause why they should not be punished for contempt was issued against and served upon Ashbaugh and Doolittle, who applied for a change of venue. This was denied. They thereupon filed an affidavit, alleging the truth of the publication. Thereafter the judge announced that he would adjudge Ashbaugh and Doolittle guilty of contempt in the immediate presence of the court in having filed their affidavit alleging the truth of the publication in question.

A. L. Sanborn, John M. Olin, and L. A. Doolittle, for the relators.

H. H. Hayden and T. F. Frawley, for the respondents.

• WINSLOW, J. The importance of the questions arising in this case, and the imperative necessity of a wise and just decision, can hardly be overestimated. These questions involve ⁷ not only the right of a court to enforce due respect for its authority, and punish acts which tend to diminish such proper respect and interfere with the performance of its important public duties, but they involve as well the preservation of personal liberty as against summary imprisonment, the right of free speech, the freedom of the press, and the proper limit which may be placed upon the discussion of the fitness of candidates for public office. Fully realizing, as we believe, the gravity of these questions, we have given the case the fullest and most careful consideration within our power, in order that no false step, involving at once consequences disastrous and far reaching, might be taken. The questions involved upon which all minor questions depend are but two in number: 1. Did the publications in question constitute a criminal contempt of court? and 2. Is the writ of prohibition the proper remedy?

1. Did the publications constitute a criminal contempt of court? In considering this question it has not been deemed necessary to reproduce the articles in this opinion. It is sufficient to say of them that, among other things, they charged Judge Bailey with having been intentionally partial and corrupt in the trial of certain causes in his court. If the charges were true, the unfitness of Judge Bailey for his office was certain. That they were intemperate in tone, and well calculated to exasperate their subject, may be at once admitted. It seems probable also that from their very intemperance they were rather calculated to injure the cause which they were designed to help than otherwise. These questions are, however, foreign to the present inquiry; the question being, not whether Judge Bailey as an individual was grossly slandered, but whether a criminal contempt of court was committed.

A criminal contempt at common law may be generally defined as any act which tends either to obstruct the course of justice or to prejudice the trial in any action or proceeding ⁸ then pending in court. The power of courts of superior jurisdiction created by the constitution to punish such acts is necessarily inherent in such a court, and arises by implication from the very act of creating the court. A court without this power would be at best a mere debating society, and not a court. These principles have been recognized in all courts from time immemorial: In re Rosenberg, 90 Wis. 581, 588; Ex parte Robinson, 19 Wall.

505; Rapalje on Contempt, sec. 1. Doubtless, this power may be regulated, and the manner of its exercise prescribed, by statute, but certainly it cannot be entirely taken away, nor can its efficiency be so impaired or abridged as to leave the court without power to compel the due respect and obedience which is essential to preserve its character as a judicial tribunal. The decisions on this point are well nigh unanimous. See authorities collated in note to Percival v. State, 50 Am. St. Rep. 568-572. It is, and must be, a power arbitrary in its nature, and summary in its execution. It is, perhaps, nearest akin to despotic power of any power existing under our form of government. Such being its nature, due regard for the liberty of the citizen imperatively requires that its limits be carefully guarded, so that they be not overstepped. It is important that it exist in full vigor; it is equally important that it be not abused. The greater the power, the greater the care required in its exercise. Being a power which arises and is based upon necessity, it must be measured and limited by the necessity which calls it into existence. The ultimate question, then, is, Is it necessary to the due administration of justice by a court that the publication of such an article as the one before us be punished as a criminal contempt?

Before discussing the authorities upon this question, it will be well to state the exact facts which were charged in the petition of Messrs. Hayden and Frawley in the circuit court. It was alleged that the articles were written by Doolittle, and by his request published by Ashbaugh; that court was ⁹ in session, with a full panel of jurors, trying jury cases, and that the articles were by the defendants generally circulated in the city of Eau Claire, and were distributed to various persons residing in this state, and were by them distributed and delivered to the officers "of said court, and to persons summoned as jurors in said court," and "were read by the officers and jurors so in attendance in said court." The articles themselves referred to no cases pending or on trial, but contained only strictures upon the general character of the judge, and his acts in former cases which had been concluded. The fact should also be remembered that a judicial election was impending, and that the judge was a candidate for re-election.

It is evident that, if any contempt was committed, it was what is known as constructive contempt, as distinguished from direct contempt: Rapalje on Contempt, sec. 22. Numerous cases are cited which are claimed to support the contention that such publications constitute constructive contempt

of court. Examination of these cases, however, reveals the fact that the great majority of them simply hold that publications of this nature, which refer to an action or proceeding then pending and undecided, constitute contempt. Such cases are *In re Sturoc*, 48 N. H. 428; 97 Am. Dec. 626; *State v. Frew*, 24 W. Va. 416; 49 Am. Rep. 257; *People v. Wilson*, 64 Ill. 195; 16 Am. Rep. 528; *Territory v. Murray*, 7 Mont. 251; *In re Cheeseman*, 49 N. J. L. 115; 60 Am. Rep. 596; *Cooper v. People*, 13 Colo. 337; *State v. Judge*, 45 La. Ann. 1250; 40 Am. St. Rep. 282. The principle on which these cases are placed is, that such publications have a natural tendency to prejudice the course of justice in the particular cause then pending, and hence constitute constructive contempt. It is unnecessary in the present case, nor would it be proper, to affirm or deny the correctness of these decisions. Such a case is not now before us. The publications complained of here referred to no pending litigation,¹⁰ nor is it charged that they were circulated or brought into the immediate presence of the court.

Passing from this class of cases, we come to the cases which involve the consideration of adverse or libelous newspaper comments upon the acts of a court in actions already past and ended, and here we find much contrariety of opinion, not to say confusion, in the utterances of courts and text-writers. Cases may be found holding directly that such publications constitute constructive contempts, and may be punished as such: *State v. Morrill*, 16 Ark. 384; *Commonwealth v. Dandridge*, 2 Va. Cas. 409; *In re Chadwick*, 109 Mich. 588. The reasoning upon which such decisions rest is, that such publications tend to diminish the respect due to the court in the trial of future causes, and thus impair its usefulness. This doctrine is certainly extreme. Carried to its ultimate conclusion, it would call for the punishment of any adverse criticism on the official conduct of a sitting judge, and absolutely prevent all public or private discussion of court proceedings. All such discussion, if unfavorable to the ability or honesty of a judge, must tend, in some small degree at least, to undermine public confidence in the court in the future. On the other hand, many well-considered cases may be found in which it is distinctly held that such publications do not constitute contempt, and cannot be punished as such. Some of these cases go upon the ground that, even if such publications were punishable as constructive contempts at common law, still that it was competent for the legislature to limit such power by statute, and that such power has been limited by

statutes substantially similar to our own: Rev. Stats., sec. 2565. Some of the cases, however, distinctly hold that under our form of government such publications do not constitute contempt, and that to punish them as such would be a serious invasion of the great constitutional guaranties of freedom of speech and of the press. The following decisions ¹¹ are cited as enunciating one or both of these principles: *Stuart v. People*, 4 Ill. 395; *Storey v. People*, 79 Ill. 45; 22 Am. Rep. 158; *State v. Dunham*, 6 Iowa, 245; *State v. Anderson*, 40 Iowa, 207; *Cheadle v. State*, 110 Ind. 301; 59 Am. Rep. 199; *In re Robinson*, 117 N. C. 533; 53 Am. St. Rep. 596; *State v. Sweetland*, 3 S. Dak. 503; *Percival v. State*, 45 Neb. 741; 50 Am. St. Rep. 568.

In our own state, the question has never been discussed in any opinion. It is a fact, however, that a case arose and was decided upon the merits early in the history of this court, while Chief Justice Whiton was on the bench, involving this very question, although for some reason no opinion was ever filed. The original records are still preserved in the clerk's office, and they disclose the following facts: In October, 1854, Messrs. Brown and Calkins published a newspaper in Madison, and during the October term of the circuit court for Dane county published an article charging corruption and malice upon the grand jury and the presiding judge of the court in the finding of an indictment against the school land commissioners. Proceedings were instituted in the circuit court as for criminal contempt, and, after hearing, the court adjudged that a contempt had been committed, and adjudged that a fine be imposed upon both defendants. The cause was removed to this court upon writ of error, was afterward argued, and the judgment was wholly reversed on the twenty-first day of May, 1858. Upon the outside of the record appears the notation, "*Stuart v. People*, 3 Scam. 402," and in the volume of court minutes appears the notation, "Opinion by the chief justice." Although no opinion was ever in fact filed, there seems to be no escape from the conclusion that this court at that time held that the publication before it did not constitute a contempt. No other ground appears upon which the judgment could have been reversed upon the merits.

But, whatever may be thought of the case just mentioned or of its weight as authority, we are well persuaded that ¹² newspaper comments on cases finally decided prior to the publication cannot be considered criminal contempt, and our reasons for that conclusion will be briefly stated.

Important as it is that courts should perform their grave

public duties unimpeded and unprejudiced by illegitimate influences, there are other rights guaranteed to all citizens by our constitution and form of government, either expressly or impliedly, which are fully as important, and which must be guarded with an equally jealous care. These rights are the right of free speech and of free publication of the citizen's sentiments "on all subjects": U. S. Const., amend. art. 1; Wis. Const., art. 1, sec. 3; the right of trial by jury: Wis. Const., art. 1, secs. 5, 7; also the right to freely discuss the merits and qualifications of a candidate for public office, being responsible for the abuse of such right in a proper action at law. In the present case it is of the utmost importance to bear in mind that Judge Bailey was a candidate before the people for re-election. Had he been a candidate for any other office, it would not be contended by anyone that the publications in question would afford ground for any other legal action than an action for libel in the regular course of the law; but the claim is, that because he was a judge, and was holding court at that time, such unfavorable criticism of his past actions may be summarily punished by the judge himself as for contempt. Truly, it must be a grievous and weighty necessity which will justify so arbitrary a proceeding, whereby a candidate for office becomes the accuser, judge, and jury, and may within a few hours summarily punish his critic by imprisonment. The result of such a doctrine is, that all unfavorable criticism of a sitting judge's past official action can be at once stopped by the judge himself, or, if not stopped, can be punished by immediate imprisonment. If there be any more effectual way to gag the press, and subvert freedom of speech, we do not know where to find it. Under such a rule, the merits of a sitting ¹³ judge may be rehearsed, but as to his demerits there must be profound silence. In our judgment, no such divinity as this "doth hedge about" a judge; certainly not when he is a candidate for public office.

Recurring to the question with which the discussion opened, namely, Is it necessary that a court should possess this power? we feel bound to hold that, considering the guaranteed rights of the citizen just referred to, no such power as this is necessary for the due administration of justice. It may be freely admitted that under the common law as administered in England the mere writing contemptuously of a superior court or judge has been declared a constructive contempt: 4 Blackstone's Commentaries, 285. We, however, adopted no part of the common law which was inconsistent with our constitution (Wis. Const., art. 14, sec.

13), and it seems clear to us that so extreme a power is inconsistent with, and would materially impair, the constitutional rights of free speech and free press.

But it is claimed that the publication constituted a criminal contempt, within the provisions of our statute. Section 2565 of the Revised Statutes, defines criminal contempts, and divides them into seven classes. Of these classes only the first and the sixth have any possible bearing upon the case. These classes are: "1. Disorderly, contemptuous, or insolent behavior committed during its sittings, in its immediate view and presence, and directly tending to interrupt its proceedings, or to impair the respect due its authority." "6. The publication of a false, or grossly inaccurate, report or copy of its proceedings; but no court can punish as a contempt the publication of true, full, and fair reports of any trial, argument, proceedings, or decisions had in such court." Certainly, the publication in question does not fall within the first subdivision. Acts punishable under this provision must have been in the immediate view and presence of the court, and it was not charged in the complaint of Messrs. Hayden and Frawley ¹⁴ that any such act had been committed. It was not even alleged that the publication had been circulated in the courtroom. Nor does the sixth subdivision apply, because it was not charged that the references to the proceedings in court were in any respect false or inaccurate. It may well be doubted whether the publication itself could be well called in any proper sense a "report or copy" of the proceedings of the court, but, conceding that it could be so called, the charge of contempt must certainly allege that the report is "false or grossly inaccurate" in order to make a case of contempt. This is jurisdictional. If it be not alleged, no contempt is stated. Our conclusion is, that the attempt to punish the publication in question as for contempt was in excess of the jurisdiction of the circuit court.

But another claim was made by the counsel who so ably represented Judge Bailey in this court, which requires some attention. It appears by the return that immediately upon the service of the alternative writ upon him, Judge Bailey announced that we would proceed no further with the pending proceedings, and that they were stayed. After making this announcement, however, the judge at once stated that a new contempt had been committed by Ashbaugh and Doolittle in the immediate presence of the court by the filing of their sworn return or affidavit in response to the original order to show cause stating that the

charges in the newspaper articles were true; that this contempt was independent of the alleged contempt by publication, and was not included within the inhibition of the writ, and that he would at once punish them for this contempt. Thereupon the judge proceeded at once to adjudge them guilty of this new contempt, and sentenced them to imprisonment therefor. We are unable to agree with this contention. If, as we have held, the original publication was not contempt, and the attempt to punish it as such was in excess of the jurisdiction of the court, then certainly the defendants had ¹⁵ a right, when summoned into court, to allege its truth. They were forced, if they were in any degree honorable men and not mere slanderers, to allege the truth of the publication. Any other course would demonstrate their pusillanimity. It cannot be endured that a court, by unauthorized summary proceedings, should wring from a man such a declaration, and then abandon the original proceedings, and punish this forced declaration as contempt.

2. The question remains whether the writ of prohibition is the proper remedy. This writ issues only to restrain a court in the exercise of judicial functions outside or beyond its jurisdiction, and when there is no other adequate remedy: *State v. Evans*, 88 Wis. 255; *Quimbo Appo v. People*, 20 N. Y. 531. Having held that the attempt to punish the publication in question as contempt was in excess of the jurisdiction of the circuit court, no reason is seen why the writ is not an apt and proper remedy, unless, indeed, there be other adequate remedies. We do not think that in a case like the present, where immediate imprisonment was threatened and about to be inflicted, either writ of error or habeas corpus can be said to be an adequate remedy. In either case the trial must have been concluded and sentence imposed before the writ could issue, and in the case of habeas corpus the imprisonment must have actually begun. There certainly is grave doubts whether certiorari would lie in any event: *Chittenden v. State*, 41 Wis. 285. In view of these considerations it seems certain that neither of the last-named writs would afford an adequate remedy, even conceding that they would be applicable. Prohibition has been used in other jurisdictions in similar cases: *Regina v. Lefroy*, 8 L. R. Q. B. 134; 4 Moak Eng. Rep. 250; *People v. County Judge*, 27 Cal. 151; *Williams v. Dwinelle*, 51 Cal. 442; *People v. Carrington*, 5 Utah, 531.

During the preparation of this opinion, the writer has been furnished with a pamphlet discussion of the law of contempts, ¹⁶ prepared by Judge Bailey. Although arriving at different con-

clusions from those reached by us, Judge Bailey's discussion of the question bears the marks of his well-known legal ability and industry, and it is but fair to say that it has been of much assistance in finding and considering authorities upon the interesting questions involved in this case.

The judgment in this case having already been entered and executed, no mandate is necessary.

CONTEMPT OF COURT—INHERENT POWER OF COURT TO PUNISH.—Powers necessary to the orderly and efficient exercise of jurisdiction are inherent. They do not depend upon express constitutional grant, nor in any sense upon the legislative will: *Hale v. State*, 55 Ohio St. 210; 60 Am. St. Rep. 691, and note. The inherent power of courts to punish summarily for contempt any act committed in their presence, or so near their sittings as to disturb their proceedings, or that is calculated to disturb their business or impair their usefulness, or bring them into disrespect or contempt, cannot be taken away by legislation: *In re Robinson*, 117 N. C. 533; 53 Am. St. Rep. 596, and note; monographic note to *Percival v. State*, 50 Am. St. Rep. 573.

CONTEMPT OF COURT—NEWSPAPER PUBLICATIONS.—There are two classes of alleged contempts of court by newspaper and similar publications; those in which it is claimed that the object of the publication was to affect the decision of a pending cause, and those which have for their apparent purpose the bringing of courts or the judges or other officers constituting an essential part thereof, into discredit. Both these classes are discussed in the monographic note to *Percival v. State*, 50 Am. St. Rep. 572-585.

PROHIBITION—WHEN IT LIES.—A writ of prohibition may issue, though there is a remedy by appeal, if that remedy is not adequate: *Havemeyer v. Superior Court*, 84 Cal. 327; 18 Am. St. Rep. 192. The unlawful assumption of jurisdiction, either of the entire cause or subject matter or of something collateral or incidental thereto, is the criterion by which to determine whether prohibition is the proper remedy: See monographic note to *State v. Commissioners of Roads*, 12 Am. Dec. 607.

BRYAN v. ADLER.

[97 WISCONSIN, 124.]

COLORED PERSON—REFUSAL OF A WAITER IN A RESTAURANT TO SERVE—LIABILITY OF MASTER.—Under the statutes of Wisconsin, declaring all persons to be entitled to the full and equal enjoyment of the accommodations and privileges of inns, restaurants, saloons, eating-houses, and other places of accommodation and amusement, and that every person violating such statute shall be liable to the person aggrieved in a sum specified as damages, with costs, the keeper of a restaurant wherein the waiters refused to serve a colored man with food is liable to him, though the action of the waiters was not sanctioned nor ratified by their employer.

MASTER AND SERVANT.—A master is liable for the willful and wrongful act of his servant directly within the scope of his employment, though not sanctioned nor ratified by the master.

G. W. Hazelton, for the appellant.

Austin & Fehr, for the respondents.

124 CASSODAY, C. J. The complaint alleges, in effect, that on and prior to October 30, 1895, the defendants were conducting ¹²⁵ a public eating-house and saloon in Milwaukee; that on that day the plaintiff and another entered said eating-house for the purpose of being served, and seated themselves at one of the tables provided for patrons, and waited some forty minutes for some one to take their order; that, on inquiry, they were informed by the defendants that their order was not taken because the plaintiff was a colored man, whereupon they left, and went elsewhere for supper; that, by such failure and refusal to take the plaintiff's order, the defendants wrongfully and unjustly denied to the plaintiff the equal enjoyment and privilege of their said eating-house, without valid reason or excuse, and by an unjust and illegal discrimination, based wholly on color, to his damage in the sum five hundred dollars.

The answer in effect admits that the defendants conducted such saloon and restaurant at the time mentioned; that they had many hundreds of patrons and many employes, and could not give personal attention to all their guests; that the plaintiff, a colored man, and his friend, a white man, were served with breakfast at their restaurant on the morning of that day; that about supper time they returned, and, after remaining in the restaurant a short time, the plaintiff complained to the defendants that he had not been served; that the defendants thereupon requested one of their waiters to serve the plaintiff, but that he refused to do so, although demanded of him by the defendants; that thereupon the plaintiff left the restaurant; that as soon as they could secure other help, they discharged said waiter; that the defendants had not been prosecuted for a misdemeanor, under chapter 223 of the Laws of 1895; that they denied that they aided, incited, or countenanced said waiter in such refusal, or that they or either of them refused the plaintiff service in their restaurant.

At the close of the trial the jury returned a verdict in favor of the defendants, and, from the judgment entered thereon, the plaintiff brings this appeal.

126 It is undisputed that the saloon and restaurant mentioned was a public eating-house; that the waiters of the defendants therein were all white; that the plaintiff was black colored; and that the refusal to wait upon him was solely by reason of his

color. The statute of this state provides, in effect: "That all persons within this state shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, restaurants, saloons, . . . eating-houses, . . . and all other places of public accommodation or amusement, subject only to the conditions and limitations established by law and applicable alike to all persons of every race and color": Laws 1895, c. 223, sec. 1. "That any person who shall violate the foregoing section or any part thereof, by denying to any person, except for reasons by law applicable alike to all persons, the full enjoyment of any of the accommodations, advantages, facilities, or privileges enumerated in said section, or by aiding or inciting such denial, . . . shall, for every such offense, be liable to the person aggrieved thereby in a sum not less than five dollars, as damages, with costs, to be recovered in any court of competent jurisdiction in the county where said offense was committed": Laws 1895, c. 223, sec. 2.

The trial court refused to direct a verdict for the plaintiff, and also refused to instruct the jury that the plaintiff was entitled to a verdict for at least the minimum sum mentioned in the law, and charged the jury, among other things, to the effect that it was undisputed that one of the waiters refused to serve the plaintiff; that such action of the waiter was inexcusable under the circumstances, and in violation of the law, and, if the evidence satisfied them that such act of the waiter was ratified by the defendants, then the defendants would be liable to the plaintiff for damages. And the trial court further charged the jury that "if you find, however, that the defendants did not ratify such action of their servant, and that the defendants did what they could reasonably be expected to do under the circumstances to ¹²⁷ enforce their orders to such servant, or, by not so doing, did not intend to, and did not, aid their waiter in carrying out his said purpose, then your verdict will be for the defendants."

These portions of the charge, as well as others, are based upon the theory that the defendants were not liable in damages for such wrongful and unlawful acts of their servants, unless they either ratified the same, or aided or incited or encouraged their servants in such nonperformance of duty. Such theory was in direct conflict with a well-settled rule of law constantly being applied by this and other courts, to the effect that "a master is liable for a wrong done by his servant, whether through negligence or the malice of the latter, in the course of an employ-

ment in which the servant is engaged to perform a duty which the master owes to the person injured": *Craker v. Chicago etc. Ry. Co.*, 36 Wis. 657; 17 Am. Rep. 504; *Bass v. Chicago etc. Ry. Co.*, 39 Wis. 636; 42 Wis. 654; 24 Am. Rep. 437; *Schaefer v. Osterbrink*, 67 Wis. 495; 58 Am. Rep. 875; *Rogahn v. Moore Mfg. etc. Co.*, 79 Wis. 573; *Reinke v. Bentley*, 90 Wis. 457. In such a case, where the wrongful act of the servant, though willful, is strictly within the scope of his employment, it is unnecessary that the master should at the time sanction or know or subsequently ratify the unlawful act, in order to be held liable for mere compensatory damages: *Id.* See, also, *Spaulding v. Chicago etc. Ry. Co.*, 33 Wis. 582; *Evans v. Davidson*, 53 Md. 245; 36 Am. Rep. 400; *Burmah Trading Corp. v. Mirza Mahomed Ally Sherazee*, 5 Indian App. 130; 31 Moak Eng. Rep. 762; *Limpus v. London Gen. Omnibus Co.*, 32 L. J. Ex. 34. This is upon the theory that what one does by his servant, acting within the scope of his employment and for his benefit is the same, in legal effect, as though done by himself. But in order to recover exemplary damages, it is otherwise, as indicated in several of the cases cited, especially *Bass v. Chicago etc. Ry. Co.*, 39 Wis. 636; 42 Wis. 654; 24 Am. Rep. 437. On the first appeal in that case, a verdict for four thousand five hundred dollars was held to be excessive, because the charge of the court precluded exemplary damages. On the second appeal, the ¹²⁸ aggregate findings of the jury were for the same amount, but the judgment thereon was affirmed, because the jury found that the wrongful act of the brakeman had been ratified by the company, and the charge permitted punitive damages by reason of such ratification.

The act of the legislature in question is entitled, "An act to protect all citizens in their civil and legal rights." It may be, as argued by counsel for the defendants, that the first section of this act adds nothing to the rights and privileges which are secured to all by the provisions of the constitution of the United States which declares that: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws": U. S. Const., amend. art. 14, sec. 1. Assuming that the act is no

broader than the constitutional provisions quoted, yet it prohibits the persons therein mentioned from doing what the state is thus prohibited from doing, and makes the offender "liable to the person aggrieved thereby, in a sum not less than five dollars, as damages, with costs," to be recovered as therein prescribed. The minimum damages thus prescribed are to be regarded as compensatory damages, as distinguished from exemplary or punitive damages. Whether the plaintiff is entitled to anything more than compensatory damages must necessarily depend upon the evidence to be given upon the trial, and the principles of law applicable.

By the Court. The judgment of the superior court of Milwaukee county is reversed, and the cause is remanded for a new trial.

MASTER AND SERVANT—LIABILITY FOR SERVANT'S WRONGFUL ACTS—RIGHTS OF COLORED PERSONS.—The old rule that the master was never liable for the willful or malicious act of his servant is not now the law. He is answerable if the act was done in his master's business, and this is the true test of his liability: *Richberger v. American Exp. Co.*, 73 Miss. 161; 55 Am. St. Rep. 522, and note. The scope of a servant's employment may be implied from its nature and the end to be accomplished: *Ephland v. Missouri Pac. Ry. Co.*, 137 Mo. 187; 59 Am. St. Rep. 498. The master may be liable though he had expressly forbidden the act in question: *International etc. Ry. Co. v. Anderson*, 82 Tex. 516; 27 Am. St. Rep. 902. Where a railroad conductor refused to afford a colored passenger the same protection given white passengers, the company was held liable: *Richmond etc. R. R. Co. v. Jefferson*, 89 Ga. 554; 32 Am. St. Rep. 87. Concerning burdens and restrictions founded on race, see monographic note to *State v. Goodwill*, 25 Am. St. Rep. 875, 876.

PIRIE v. STERN.

[97 WISCONSIN, 150.]

JUDGMENT—CONFESSION OF IN ONE STATE UPON POWER OF ATTORNEY EXECUTED IN ANOTHER.—A note dated and executed in Illinois and purporting to waive the benefit of the exemption laws of that state, and to authorize any attorney in any court of record to appear for the maker and to confess judgment without process in favor of the holder of such note for such amount as may appear to be unpaid thereon, authorizes the confession of judgment in another state by any attorney thereof.

JUDGMENT BY CONFESSION—ATTORNEYS' FEES IN.—Where a note authorizes the confession of judgment thereon by any attorney, including ten per cent attorneys' fee, a judgment so confessed including such fees is not void, where it is not shown that the attorneys' fees were unreasonably large or were a mere cloak for a fraudulent transfer of property without consideration.

W. J. Turner, for the appellants.

Mock, Riley, Wittig & Schinz, for the respondents.

¹⁵³ WINSLOW, J. Two principal contentions are made by the intervenor upon which the order setting aside the plaintiffs' judgment is sought to be justified: 1. That the judgment note did not authorize the entry of judgment thereon in Wisconsin, but only in Illinois; and 2. That the including of ten per cent attorney's fees in the warrant rendered it fraudulent and void as to creditors.

1. It is well established that "the authority to confess a judgment without process must be clear and explicit, and must be strictly pursued": *Manufacturers' etc. Bank v. St. John*, 5 Hill, 497. We think, however, that it would be a very great surprise to the profession to learn that a general power of attorney purporting to authorize the entry of judgment in any court of record does not in fact authorize the entry of judgment in any state save the state in which the note is given. Such, certainly, has not been the prevailing idea as to the law on this subject, as is well proven by the numerous instances of the entry of such judgments, without objection, in the courts of this state, upon warrants similar to the one in suit executed in other states. The judgment note is now in wide use, and is recognized as a very convenient and valuable security in the business world. The business relations between the various states are very close, and growing closer every year; and if it be true that a judgment note in general terms, taken in one state, cannot be used in another, then, certainly, its usefulness will be very ¹⁵⁴ seriously impaired. Two decisions only, so far as we know, justify this contention, viz., *Carlin v. Taylor*, 7 Lea, 666, and *Davis v. Packer*, 8 Ohio C. C. 107.

In the Tennessee case, it was held that a warrant authorizing any attorney in the United States or elsewhere to confess judgment was void for "comprehensive uncertainty." The Ohio case holds that a general power of attorney executed in Illinois authorizing the entry of judgment in any court of record does not authorize the entry of judgment in an Ohio court. We are not satisfied with the reasoning in either of these cases. We are unable to see any reason why a debtor may not give a general warrant of attorney to his creditor authorizing the entry of judgment in "any court" that the creditor may choose, and why such power should be held void as comprehensively uncertain is not clear. The very fact that judgment may be entered in one state

as well as another gives added value to the security, and was doubtless intended so to do. Certainly, when the warrant authorizes the entry of judgment in "any court of record," the authority given is clear and explicit enough to satisfy the most fastidious. The power is very broad and sweeping, but it is at the same time clear and explicit.

The case of *Manufacturers' etc. Bank v. St. John*, 5 Hill, 497, was also cited as sustaining the proposition that no judgment could be entered on this warrant in Wisconsin. This case simply decided that when a warrant showed on its face that it was only intended to be used in Pennsylvania, it could not be executed in New York. This doctrine is entirely reasonable. If a power of attorney drawn in general terms contain also provisions plainly showing the intention to limit the execution to one state, it would certainly seem proper to construe the general words as being limited by the special provisions: Freeman on Judgments, sec. 545. We find in the warrant before us no satisfactory indication of an intention to limit its operation to the state of Illinois. The waiver of the benefits of ¹⁵⁵ the Illinois exemption laws can hardly be construed as such a limitation. The circumstances under which the note before us was executed would very clearly rebut any such intention. It was executed by merchants who were residents of and doing business in Wisconsin, and who were simply in Chicago for the purpose of buying goods. An intention to limit the operation of the warrant to the state of Illinois would not be reasonable or probable. We conclude that the warrant authorized the entry of judgment in Wisconsin.

2. Did the including of ten per cent attorney's fees in the warrant and judgment render both void as to creditors? This question must also be answered in the negative. Such stipulations, when reasonable in amount, have been held valid by this court: *Vipond v. Townsend*, 88 Wis. 285; *First Nat. Bank v. Larsen*, 60 Wis. 206; 50 Am. Rep. 365. It is true that it is also held in the case last cited that such a stipulation is not conclusive as to amount, but that a reasonable amount must be fixed by the court or jury on the trial. The question here, however, is whether the judgment will be set aside simply because the attorney's fee was not assessed by a court or jury. Upon familiar principles, it will not be set aside unless it be shown to be unreasonable or inequitable, as well as irregular. We see no evidence of actual fraudulent intent here, and we do not understand that the trial court found actual fraud, but simply that

the including of the attorney's fee was a gratuity given by an insolvent debtor to a creditor, which rendered the whole security void as a matter of law. In this conclusion we cannot agree. An insolvent debtor may give a valid judgment note to his creditor if the transaction be free from fraud, subject, however, to the provisions of law relating to the setting aside of such transactions when they take place within sixty days prior to the execution of a voluntary assignment: Sanborn and Berryman's Annotated Statutes, sec. 1693 a. If a valid judgment note can be given, certainly it may include the provisions which such notes usually contain, ¹⁵⁶ and the provision for an attorney's fee is one of those provisions. If it were shown that the attorney's fee was unreasonably large, or was a mere cloak for a fraudulent transfer of property without consideration, the question would be different.

No other questions are presented which are important enough to require discussion.

By the Court. Order reversed, and action remanded with directions to deny the motion.

JUDGMENTS BY CONFESSION.—A WARRANT OF ATTORNEY purporting to give authority to confess judgments in courts beyond, as well as within the limits of the state where it is executed, is not void. It confers authority to confess judgment in that state, whatever be its effect elsewhere: First Nat. Bank v. Garland, 109 Mich. 515; 63 Am. St. Rep. 597, and note. See Spence v. Emerine, 46 Ohio St. 433; 15 Am. St. Rep. 634.

JUDGMENTS BY CONFESSION—WARRANT OF ATTORNEY—ATTORNEY'S FEES.—Stipulations by which a debtor agrees to pay fees of his creditor's attorney in case the latter is compelled to resort to legal proceedings to collect his debt is an agreement which is not only eminently just, but which rests upon a good and valuable consideration: Weigley v. Matson, 125 Ill. 64; 8 Am. St. Rep. 335.

McHUGH v. McCole.

[97 WISCONSIN, 166.]

CY PRES.—The doctrine of cy pres as it existed in England and has been applied in some of the states of the American Union, whereby trust provisions are administered and executed as near to the presumed intention of the founder as may be, is not recognized as a part of the judicial power in the state of Wisconsin.

TRUSTS, TO BE CHARITABLE, must be of such a clear and definite nature that a court of equity may deal with them in the exercise of its ordinary functions and render them effective.

CHARITABLE TRUSTS—FATAL UNCERTAINTY IN.—A bequest of a sum of money to the bishop of F., to be used by

him for the benefit and behoof of the Protestant Episcopal Church of F., such church not being a corporate body or legal entity capable of taking the fund, but consisting of several churches or organizations, is void for uncertainty. The court cannot determine as to which of the churches or what members thereof shall participate in the testator's bounty.

CHARITABLE TRUSTS—UNCERTAINTY.—A bequest of property to be used by a Roman Catholic bishop of the diocese of G., for the benefit and behoof of the Roman Catholic church, is void for uncertainty.

CONVERSION OF REALTY INTO PERSONALTY.—A power of sale, however peremptory in form, does not operate as a conversion in the aid of any particular purpose of the testator, where the plan or purpose fails by reason of illegality, lapse, or other cause. In such a case, the property retains its original character and goes to the heir or next of kin as real or personal estate, as the case may be.

TRUST FOR MASSES.—A bequest of a sum of money to the Roman Catholic bishop of the diocese of G., to be used by him for masses for the repose of the souls of designated persons in the several sums in the will specified, is void for want of beneficiaries who may come into equity and enforce its performance.

A TRUST NOT CAPABLE OF ENFORCEMENT BY A COURT cannot be sustained on the ground that the trustee has accepted it and will carry it out according to what he understands to be the wishes of the donor.

TRUSTS—WHEN NOT SUSTAINABLE.—To constitute a valid testamentary trust there must be a definite beneficiary, either named or capable of being ascertained within the rules of law applicable to such cases. The absence of a definite beneficiary is, as a general rule, a fatal objection to any attempt to create a valid trust.

TRUST—REQUEST FOR MASSES, WHEN CREATES.—A bequest of a sum specified to a Roman Catholic bishop of the diocese of G., to be used and applied for masses for the repose of the soul of the testator and the souls of other deceased persons designated in the will, is not a bequest to the bishop to have and enjoy as he may deem best, but is an attempt to create a trust.

Suit by the heirs at law of Owen McHugh, deceased, against his executor, Patrick McCole, and against the bishop of the Roman Catholic diocese of Green Bay, Bridget Carney, John O'Rourke, and Frank McGrath, as trustees of St. Augustine's Roman Catholic Church at Chilton, C. C. Grafton, bishop of the Protestant Episcopal Church of Fond du Lac, and the Catholic Orphan Asylum of Green Bay, Wisconsin, for the construction of the will of Owen McHugh, deceased, and particularly with reference to the bequests and devises of paragraphs 4 and 7 thereof, and to obtain an adjudication whether the provisions of such paragraphs were void. By the fourth provision of his will the testator bequeathed to the Protestant Episcopal bishop of Fond du Lac three hundred dollars, "to be used by him for the benefit and behoof of the Protestant Episcopal Church of said diocese of Fond du Lac, Wisconsin." By the seventh clause of the will

there was given to the Roman Catholic bishop of the diocese of Green Bay, Wisconsin, the sum specified therein, "to be used and applied as follows: for masses for the repose of my soul, two thousand dollars; for masses for the repose of the soul of my deceased wife, Mary McHugh, the sum of one thousand dollars; for the repose of the soul of my deceased son, John McHugh, five hundred dollars; for the repose of the soul of my deceased daughter, Katie McHugh, the sum of one hundred dollars; for masses for the repose of the souls of my father and mother, Owen and Hannah McHugh, fifty dollars; for the Roman Catholic Orphan Asylum at Green Bay, Wisconsin, the sum of five hundred dollars." The testator, by the seventh clause of the will, bequeathed and devised the balance of his estate "to the Roman Catholic bishop of Green Bay, Wisconsin, to be by him used for the benefit and behoof of the Roman Catholic Church." The trial court denied the validity of that part of the will making bequests of money to be used for masses, and also the bequest contained in clauses 4 and 7 of the will.

J. E. McMullen and L. J. Nash, for the plaintiffs.

Wigman & Martin, for the defendants.

¹⁷² PINNEY, J. The record does not disclose how much of the testator's estate consisted of realty, or how much of personal property. It may be fairly assumed from the seventh or residuary clauses of the will, disposing of "all the rest, residue, and remainder of the testator's estate, real or personal," to the Roman Catholic bishop of Green Bay, Wisconsin, "to be by him used for the benefit and behoof of the Roman Catholic Church," that the testator owned both real and personal estate, and that it was understood that there might be a residue or remainder of either real or personal estate not required for the payment of the legacies specified in the will. The will contemplates, as to the legacies therein named, that it should be executed in personalty exclusively, and that any residue of real estate which it might not be necessary to sell in order to pay said legacies should pass under the residuary clause in the will. It was plainly the intent of the testator that, for the purpose of satisfying said legacies, his executor should convert, if need be, all his real estate into money. If the said provisions of the will are valid, the doctrine of equitable conversion would apply to the extent that the provisions of said will may be valid; and the court would deal with the estate as personalty: *Dodge v. Wil-*

liams, 46 Wis. 97; Webster v. Morris, 66 Wis. 399; 57 Am. Rep. 278. It will be seen upon an examination of the record that if a residue of realty remained unsold, the sale of which was not necessary for the payment of such bequests, the validity of ¹⁷³ the will as a devise of such realty will be determined by principles involved in the determination of the validity of the bequests above stated. All the contested provisions of the will are essentially trust provisions, and appear to be void for uncertainty and wholly incapable of being executed by a court of equity by virtue of its judicial jurisdiction over private trusts. Unless they can be so executed, they must necessarily fail; for it is settled that the doctrine of cy pres—as it existed in England and as it has been applied in some of the states of the American Union, whereby trust provisions are administered and executed as near to the presumed intention of the donor or founder as may be—is not recognized or acted upon by the courts of this state as a part of the judicial power of the state. The doctrine rests upon a prerogative or sovereign power, is not strictly judicial in its nature, and consequently the courts of the state cannot exercise it: Will of Fuller, 75 Wis. 435; Heiss v. Murphey, 40 Wis. 276; Ruth v. Oberbrunner, 40 Wis. 238.

We are of opinion that the trust provisions in question are void for uncertainty, in that no certain and competent beneficiaries are named who may come into a court and claim and establish their right to the fund and to the execution of the trusts of the will; and no method has been prescribed or pointed out for the administration of the several funds or their application to the purposes of the supposed trusts. The testator has not fully defined his trust purposes, but has left them so indefinite that it is impossible for the court, in the exercise of its judicial functions, to administer them after the manner of private trusts, without in substance making a new will for the testator, or at least new and effective provisions to carry his supposed intentions into effect: Will of Fuller, 75 Wis. 435. In order that these trusts shall be sustained they must be of such a clear and definite nature that the court can deal with them in the exercise of its ordinary judicial functions, and render them effective: Webster ¹⁷⁴ v. Morris, 66 Wis. 366; 57 Am. Rep. 278; Heiss v. Murphey, 40 Wis. 276; Estate of Hoffen, 70 Wis. 522. The position that the disputed trust provisions of this will are hopelessly indefinite and uncertain, for the reasons stated, is supported by very many recent and well-considered cases, and by arguments which we are compelled to regard as unanswerable.

It was conceded by the learned counsel for the party seeking to maintain these several disputed provisions that, regarded as trusts, they must necessarily fail. That they are trust provisions, imposing active duties upon the trustee, does not, we think, upon a consideration of their terms, admit of doubt or question.

1. The bequest of three hundred dollars to the bishop of Fond du Lac, Wisconsin, is "to be used by him for the benefit and behoof of the Protestant Episcopal Church of Fond du Lac, Wisconsin." The Protestant Episcopal Church of the diocese of Fond du Lac is not, so far as we are advised, a body corporate or legal entity, capable in law of taking, claiming, or asserting any right in court to this fund, and could not, as against the personal representatives and distributees of the testator or donor, apply for and have it paid over. It consists, as we understand, of several churches or organizations, and there has been no selection, or provision for any, as to which of said churches, or what members of either of them, are to take or to participate in the donor's bounty, or to what extent, nor has there been authority conferred on anyone to make such selection. In the absence of such provision, the court will be powerless to make any such selection without any plan or scheme, *cy pres*, for the distribution of the funds.

2. The seventh or residuary clause of the will is of like character and subject to similar infirmities. The property to be affected by this provision is "to be used" by the Roman Catholic bishop of the diocese of Green Bay, "for the benefit and behoof of the Roman Catholic Church." What church or body is thus designated or intended? Is it the Roman ¹⁷⁵ Catholic Church in any particular city, state, or diocese? Certainly no such church is specified. Or does this designation include the Roman Catholic Church throughout the entire world? The difficulty—indeed, the utter impossibility—of dealing with and executing this provision as a valid trust is, we think, obvious and insuperable; and, within the authorities, this clause of the will must be regarded, for these reasons, as void and inoperative for any purpose, and utterly ineffective to pass any interest or estate whatever to the bishop of the Roman Catholic Church of the diocese of Green Bay. Manifestly, he could not take or derive thereunder any trust estate or interest which a court of equity could execute, protect, or enforce, for want of certain, competent, and definite beneficiaries of the trust. It is evident that no one of these trust provisions affecting the testator's real

estate can be sustained under the statute in relation to uses and trusts. No one of them is for any one of the purposes specified in section 2081 of the Revised Statutes, for which express trusts in real estate may be created; and neither of them is so framed that it can be sustained as being "for the beneficial interests of any person or persons, when such trust is fully expressed and clearly defined upon the face of the instrument creating it." Whatever residue, therefore, of real estate may remain after satisfying the valid bequests of the will, is undisposed of by it, and must go to the heirs at law of the testator. Failing the bequests in the fifth and seventh clauses in the will, the purpose of the conversion of real estate into personalty ceases, except as to the valid bequests. The case in this respect falls within the general principle that a power of sale, however peremptory in form, does not operate as a conversion in aid of a particular purpose of the testator where the testator's plan or purpose fails by reason of illegality, lapse, or other cause. In such event, an intention to convert realty into personalty will not be implied, and the property retains its original character, and goes to ¹⁷⁶ the heir or next of kin as real or personal estate, as the case may be: *Read v. Williams*, 125 N. Y. 571; 21 Am. St. Rep. 748.

The bequest for the Catholic Orphan Asylum at Green Bay, Wisconsin, an incorporated body, was sustained, and is not in question on these appeals. That part of the judgment adjudging the bequest in the sixth clause of the will of five hundred dollars to the trustees of the Roman Catholic Church at Chilton, Calumet county, to wit, St. Augustine Church (to be used for the benefit of said church, and in repairing the same), void, does not appear to have been appealed from, and its validity is not now in question.

The trust provision in the fifth paragraph of the will, bequeathing three thousand six hundred and fifty dollars, to be used and applied for masses as therein specified, is also void, for the reason that there is no beneficiary or beneficiaries of the trust who may come into equity and enforce performance. It is evident that such a trust is not capable of execution, and no court could take cognizance of any question in respect to it for want of a competent party to raise and litigate any question of abuse or perversion of the trust. Although the testator has used language ordinarily used for the declaration of a trust, it is argued that the court cannot impute to him the intention of creating a trust simply for the sake of subsequently condemning it. It is the duty of the court to declare the construction and meaning

of this clause of the will, and then to determine whether it is in conformity with the law. Where the language is plain and unambiguous, we are not permitted to wrest it from its natural import, in order to save a provision from condemnation: *Cottman v. Grace*, 112 N. Y. 309. The court is still bound to give judgment upon the essential character of the instrument, according to its true legal effect and meaning. In *Ford v. Ford*, 70 Wis. 21, 5 Am. St. Rep. 117, a trust was held to exist under the provisions of a will as a matter of construction, and yet the court declared it void as to a part of the property affected by it. It is a well-settled rule that, where ¹⁷⁷ a trust fails for indefiniteness or uncertainty, the representatives or distributees of the donor will prevail over the claimant under the trust: *Levy v. Levy*, 33 N. Y. 107; *Holland v. Alcock*, 108 N. Y. 313; 2 Am. St. Rep. 420. In the case last cited, the will of G. bequeathed his residuary estate, which consisted exclusively of personalty, to his executors, in trust for the purposes expressed therein, as follows: "To be applied by them for the purpose of having prayers offered in a Roman Catholic church, to be by them selected, for the repose of my soul and the souls of my family, and also the souls of all others who may be in purgatory." It was held that the trust so attempted to be created was invalid; and that, as to such residuary estate, the testator died intestate, and the next of kin of the testator were entitled thereto, as there was no beneficiary in existence, or to come into existence, who was interested in or who could demand the execution of the trust.

In *Holland v. Alcock*, 108 N. Y. 313, 2 Am. St. Rep. 420, it was said: "When a trust is attempted to be created without any beneficiary entitled to demand its enforcement, the trustee would, if the trust property were in his possession, have the power to hold it to his own use, without accountability to anyone, and contrary to the intention of the donor, but for the principle that in such a case a resulting trust attaches in favor of whoever would, but for the alleged trust, be equitably entitled to the property. This equitable title cannot, on any sound principle, be made to depend upon the exercise by the trustee of an election whether he will or will not execute the alleged trust. In such a case there is no trust, in the sense in which the term is used in jurisprudence. There is simply an honorary and imperfect obligation to carry out the wishes of the donor, which the alleged trustee cannot be compelled to perform, and which he has no right to perform, according to the wishes of those legally or equitably entitled to the property, or who have suc-

ceeded to the title ¹⁷⁸ of the original donor. The existence of a valid trust capable of enforcement is consequently essential to enable one claiming to hold as trustee to withhold the property from the legal representatives of the alleged donor. A merely nominal trust, in the performance of which no ascertainable person has any interest and which is to be performed or not as the person to whom the money is given thinks fit, has never been held to be sufficient for that purpose." In *Levy v. Levy*, 33 N. Y. 107, Wright, J., said that, "if there is a single postulate of the common law established by an unbroken line of decisions, it is that a trust without a certain beneficiary who can claim its enforcement is void": *Prichard v. Thompson*, 95 N. Y. 76; 47 Am. Rep. 9. And in *Fosdick v. Hempstead*, 125 N. Y. 589, it was held that, to constitute a valid testamentary trust, there must be a defined beneficiary either named or capable of being ascertained, within the rules of law applicable in such cases. The beneficiaries under these disputed trust provisions are neither named nor capable of being ascertained, within the rules of law applicable to such cases.

The elaborate decision in the case of *Holland v. Alcock*, 108 N. Y. 312, 2 Am. St. Rep. 420, would seem to be decisive of the trust for masses; nor is it supported by the case of *Power v. Cassidy*, 79 N. Y. 602, 35 Am. Rep. 550, as explained in *People v. Powers*, 147 N. Y. 104. In *Holland v. Alcock*, 108 N. Y. 313, 2 Am. St. Rep. 420, it was contended that the disposition in question contained all the elements of a valid trust of personal property; that there were definite and competent trustees; that the purpose of the trust was lawful, and it was sufficiently defined to be capable of being enforced by a court of equity, as the court could decree the payment of the legacies for the purposes directed by the will. But to this contention the court responded that, if all this should be conceded, there is still one more important element lacking. There is no beneficiary in existence, or to come into existence, who is interested in or ¹⁷⁹ can demand the execution of the trust. No defined or ascertainable living person has, or ever can have, any temporal interest in its performance; nor is any incorporated church designated, so as to entitle it to claim any portion of the fund. The absence of a defined beneficiary is, as a general rule, a fatal objection to any attempt to create a valid trust. In *Read v. Williams*, 125 N. Y. 560, 21 Am. St. Rep. 748, the bequest was to such charitable institutions and in such proportions as the executors, by and with the advice of the testatrix's friend, Rev.

John Hall, D. D., should choose and designate. After the death of the testatrix, the executors, with the advice and approval of Dr. Hall, made a written designation of certain incorporated charitable institutions; but it was held, under the language used, a charitable institution was not capable of taking, and that it was not such a trust as could be carried into execution by the court; and it was therefore held void. In *Fosdick v. Hempstead*, 125 N. Y. 589, the bequest was to the town, to keep as a fund for the support of the poor of the town; and it was held that the bequest was indefinite and invalid, for the want of an ascertained beneficiary, the "poor of the town" being too general; and it was said that, applying the rule to these cases, it appears that the conclusion is inevitable that the trust attempted to be created is unenforceable, for the reason of a failure to designate the beneficiary or to designate or describe a class or kind of beneficiary, to whom distribution is practicable, or that could with reasonable certainty be identified and ascertained. These considerations and authorities sustain as well the proposition that the residuary clause of the will relied on is clearly invalid and inoperative.

3. In support of the cross-appeal of the executor from so much of the judgment as declares that part of the fifth paragraph of the will bequeathing three thousand six hundred and fifty dollars, to be used and applied for masses as therein specified, void for indefiniteness and uncertainty, it was contended that this provision was not in ¹⁸⁰ fact valid as a trust, but that it was a valid bequest of that sum personally to the bishop of the diocese, and that there was no limitation of this bequest in his hands; that it was his to use and enjoy as he chose; that he might burn it up the moment received, and his doing so would not impair in any degree his ability to execute the testator's wish; that it was not named as a consideration for the masses; and that the bishop could as well perform the service without as with it. It was also contended "that this gift was absolute to the church." We know of no legal reason why any person of the Catholic faith, believing in the efficacy of masses, may not make a direct gift or bequest to any bishop or priest of any sum out of his property or estate for masses for the repose of his soul or the souls of others, as he may choose. Such gift or bequests, when made in clear, direct and legal form should be upheld; and they are not to be considered as impeachable or invalid, under the rule that prevailed in England, by which they were there held void, as gifts to super-

stitious uses. No such rule or principle obtains here. Had the testator made a plain, direct bequest of the sum in question to Bishop Messmer, or to any bishop or priest, for masses for the repose of the souls of the persons named in his will in that behalf, it would certainly be our duty to declare it valid, and give full effect to it. It is a matter of regret when a will or other disposition of property is so framed that effect cannot be legally given to what may well be supposed to have been the intention of the testator or donor; but the law, for wise and just reasons of public policy, has established rules and has made provisions in these respects that may not be disregarded. The true interests of society are best subserved in all such cases by faithfully following the law made to regulate and protect the interests of all alike; and it is the duty of courts in all such cases to adhere to it, and uphold its salutary provisions and principles.

As has already been said, we are clearly of the opinion ¹⁸¹ that the fifth clause of the will is essentially a trust provision. There is no foundation in the language used for the contention that this clause operates as a bequest in favor of any church or person. We are to give full force and effect to the language of the testator, and this, in the strongest and clearest terms, excludes the contention of the counsel for the bishop. It does not give or bequeath to S. G. Messmer, in his personal right or individual capacity, any sum whatever for masses or other purpose. The position of the parties and the relations between them seem to repel any such intention to bestow the sum named as a personal bequest. The express language of the will is, that it is given "to be used and applied as follows: For masses for the repose of," et cetera. This language is the proper and appropriate language quite universally used to create trust provisions of an active character in wills and other instruments. It excludes the idea of personal interest on the part of the donee of the fund, or any authority to make a personal use and application of it. It would be a most unwarranted construction, we think, to place upon this provision, to hold that language imposing a mere matter of duty—to use and apply a fund for a particular purpose—should operate by way of gift to the person upon whom the instrument imposed the duty. The bequest is not to any church, nor to Bishop Messmer. It was not designed to include him personally, because it could not be known that upon the occurrence of the death of the testator, by which the will would become operative, he would be bishop, so as to an-

swer the description in the will. A similar contention—whether a trust provision, invalid as such, might be considered a direct bequest—was decided in *Festorazzi v. St. Joseph Roman Catholic Church*, 104 Ala. 327, 53 Am. St. Rep. 48, in the note to which the cases bearing upon this question appear to have been fully collected. The clauses of the will there in question were substantially the same as in the case at bar: “I give and ¹⁸² bequeath to the Roman Catholic Cathedral in the city of Mobile the sum of three thousand dollars, the same to be used in solemn masses for the repose of my soul”; and “I give and bequeath to the Roman Catholic Church of St. Joseph in the city of Mobile the sum of two thousand dollars, also to be used in solemn masses for the repose of my soul.” And it was held that the provisions could not be considered a direct bequest to the church for its general use, and that the form of the bequest repelled the idea that a gift to the church for its general use was intended. The court said: “The bequest is to the church, ‘to be used in solemn masses for the repose of my soul.’ Similar bequests have been many times before the courts in England and this country, and in all the cases, so far as our research extends, they were treated as having the form and nature of the declaration of a use or trust, and not as direct gifts to, and for the general uses of, the church. An application of the fund to other uses than securing masses to be said for the repose of the donor’s soul would contravene the intent and purpose of the testator”; that the authorities, whether English or American, are potent to show that they partake of the nature of trusts, and cannot be treated as gifts to the churches themselves. And it was said that the trust was not valid as a private trust, for the want of a living beneficiary; that a trust in form, of which no one could enjoy or enforce the use, is no trust, and that argument was unnecessary to show that there was no imaginable being possessing power to enforce the use declared in the bequest; that the executor could not, because he succeeds only to the right of the testator; and if the church should receive this bequest, and apply it to paying its debts or supporting its priests, the purpose would be clearly violated. But what living person is authorized to call the trustee to account for the misuse of the fund? If a trust for a specific purpose fails by the failure of the purpose, the property reverts to the donor or his heirs; and if the gift is made upon a trust ¹⁸³ insufficiently or ineffectually declared, as if it is too indefinite, vague, and uncertain to be carried into effect, the gift will revert to the settler, his heirs or representa-

tives. And it seems to be well settled that, where a gift is made upon trusts that are void in whole or in part for illegality, a trust will result to the donor, his heirs or legal representatives, if the property is not otherwise disposed of; and the donee will take in trust for the donor or his heirs or representatives. The case of Rhymer's Appeal, 93 Pa. St. 142-145, 39 Am. Rep. 736, is an authority to show that the provision in question was a trust provision, and not a bequest by which the parties named were intended to take beneficially. We hold that the disputed trust provisions of the will of the testator are void trusts, and are not valid personal bequests.

It follows from these views that so much of the judgment appealed from by the plaintiffs as adjudges that the deceased, Owen McHugh, disposed of three hundred dollars of his estate to the defendant C. C. Grafton, Protestant Episcopal bishop of Fond du Lac, and so much thereof as orders and adjudges that the rest, residue, and remainder of the estate of said deceased be assigned to S. G. Messmer, Roman Catholic bishop of Green Bay, for the benefit and behoof of the Roman Catholic Church of said diocese, be reversed; and that so much of the judgment appealed from by Patrick McCole, executor of the deceased, as declares that part of the fifth paragraph of the will of the testator bequeathing three thousand six hundred and fifty dollars to be used for masses as therein specified void for indefiniteness and uncertainty, be affirmed. The costs of the respective parties, to be allowed and adjusted by the judge of the county court, are to be paid out of the estate of the testator.

By the Court. It is ordered accordingly.

TRUSTS—DOCTRINE OF CY PRES.—As applied by the chancellor of England, the doctrine of cy pres is not, to its full extent, a judicial doctrine, and so far as it is ultra judicial it cannot be recognized by courts of equity here: *Curling v. Curling*, 8 Dana, 38; 33 Am. Dec. 475, and note. It does not prevail in New York: *Tilden v. Green*, 130 N. Y. 29; 27 Am. St. Rep. 487; nor in Tennessee: *Johnson v. Johnson*, 92 Tenn. 559; 36 Am. St. Rep. 104, and note. See *Teele v. Bishop of Derry*, 168 Mass. 341; 60 Am. St. Rep. 401, and note.

CHARITABLE TRUSTS—WHAT ARE—WHEN FATAL FOR UNCERTAINTY.—The legal meaning of a charity is a gift for a public use: See monographic note to *Hoeffler v. Clogan*, 63 Am. St. Rep. 249, as to what are charitable uses or trusts. A charity may be void because there is no one who can demand of the trustees the benefit of the trust as a beneficiary of it: *Johnson v. Johnson*, 92 Tenn. 559; 36 Am. St. Rep. 104, and note. A charity may be void for uncertainty of amount given, of object, or of donee. See monographic note to *Bridges v. Pleasants*, 44 Am. Dec. 98, and monographic note to *Fifield v. Van Wyck*, 64 Am. St. Rep. 756, 771.

Whether an unincorporated society is a sufficiently definite or certain donee is a question much controverted. See monographic note to *Bridges v. Pleasants*, 44 Am. Dec. 101.

EQUITABLE CONVERSION OF REALTY INTO PERSONALTY—FAILURE OF PURPOSE.—Where the purpose of a directed conversion of realty into personalty fails because of the illegality of the disposition attempted to be made of the converted property, or for any other cause, such conversion does not take place. See monographic note to *Ford v. Ford*, 5 Am. St. Rep. 146, 147.

Of Bequests for Masses.*

Questions relating to charitable trusts have received considerable attention in two recent notes in our series. To avoid repeating herein the results of former research into matters collateral to the subject of this note, we shall confine our attention to the cases wherein bequests or devises similar to that in the principal case have come before the courts, and refer to former notes for matter contained therein and helpful to a consideration of the matter directly in hand. The principal case is one of a comparatively small number of cases which have arisen in this country concerning the validity of bequests for masses. Indeed, if we include all similar cases in the English, Irish, and Canadian reports, the number is still small. Yet their treatment of the question is far from uniform. It may be stated generally that in our own country such bequests if held invalid are so held, not because of illegality of purpose, but on account of a mistaken choice of means to accomplish their purpose. American law as to charitable uses and trusts is statutory in part, and in part based upon the common law of England. The relative importance of these constituent elements varies in different states, and to this variance is due much of the apparent conflict of the cases hereafter considered: See monographic note to *Hoeffler v. Clogan*, 63 Am. St. Rep. 252-256.

Superstitious Uses.—In England a bequest or gift of property for the purpose of having masses said for the repose of the donor's soul is held void as being for a superstitious use: *West v. Shuttleworth*, 2 Mylne & K. 684; *In re Blundell's Trusts*, 30 Beav. 360; *Heath v. Chapman*, 2 Drew, 417; *Attorney General v. Fishmonger's Co.*, 2 Beav. 151. The English doctrine of superstitious uses originated in the reigns of Henry VIII and Edward VI, when statutes were enacted to prevent the devoting of property to what were termed "superstitious uses." These statutes were passed before the fourth year of James I. Under the statute, 1 Edward VI, gifts or devises of the class in question were held invalid as being for superstitious uses. Therefore, since the common law as it existed prior to the fourth year of James and the statutes of England then existing were adopted by the colonies, it has been insisted that these English statutes are binding upon our courts. It is acknowledged in *Harrison v. Brophy* (Kan. 1898) that "unless these

*** REFERENCES TO MONOGRAPHIC NOTES.**

Religious uses: 39 Am. Rep. 738-741.

Charitable uses or trusts: 63 Am. St. Rep. 248-269.

Of the certainty and unity required in charitable trusts: 64 Am. St. Rep. 756-772.

statutes have been abrogated or modified by constitutional or statutory law, judicial decisions, and the conditions and wants of the people, they are of binding force in this state." It has been doubted whether the statute of 1 Edward VI justified the courts, otherwise than by analogy, in holding bequests similar to that in the principal case, invalid: *Harrison v. Brophy* (Kan. Sup. Ct., Jan., 1898). See *Pickering Statutes at Large*, 5, 271, 272, 277. In Ireland, such bequests have been upheld as not being invalid at the common law: *Read v. Hodgins*, 7 I. R. Eq. 17; *Commissioners v. Walsh*, 7 I. R. Eq. 24; and in Canada they have been held "free from any taint of illegality": *Elmsley v. Madden*, 18 Grant U. C. 386.

In the United States.—If we were to grant that the statutes interdicting superstitious uses were a part of the law which we inherited from England, we might, by examining their terms, and the conditions then existing in England, find excuse for sustaining the bequests in question in our own country. However, such a course is unnecessary. The doctrine of superstitious uses has not been adopted by our courts. It is directly opposed to the spirit of our institutions. "Under our political institutions which maintain and enforce absolute separation of church and state, and the utmost freedom of religious thought and action," there is no place for such doctrine: *Festorazzi v. St. Joseph's Catholic Church*, 104 Ala. 327; 53 Am. St. Rep. 48; *Moran v. Moran*, 104 Iowa, 216; post, p. 443; *Methodist Church v. Remington*, 1 Watts, 219. The general view of the authorities is, that the validity of such bequests is assured by the provisions of the federal and state constitutions relating to freedom of conscience and religious belief: *Kerrigan v. Tabb* (N. J. Eq., 1898). "That religious intolerance which infused itself through parliamentary enactments and judicial sentences, and which procured the law to anathematize different creeds as 'superstition' and 'heresy,' according as Catholic or Protestant gained governmental ascendancy, was, more than anything else, what our ancestors fled from. It would be strange, indeed, had they carried to this country, and established here the very laws of religious persecution from which they sought to escape": *Harrison v. Brophy* (Kan. 1898). See *Rhymer's Appeal*, 93 Pa. St. 142; 39 Am. Rep. 736; *Hoeffler v. Cloghan*, 171 Ill. 462; 63 Am. St. Rep. 241; *Holland v. Alcock*, 108 N. Y. 312; 2 Am. St. Rep. 420.

Having no standard of orthodoxy in this country we are often without a criterion to determine what is superstitious and what religious. The nature and general purpose of masses are generally understood. Belief in the efficacy of masses is an essential part of the Roman Catholic idea of purgatory, which latter is an especial tenet of the faith. Such being the case, and there being no positive rule of law to the contrary, bequests for masses cannot be attacked as superstitious: *Hoeffler v. Cloghan*, 171 Ill. 462; 63 Am. St. Rep. 241; *Matter of Hagenmeyer's Will*, 12 Abb. N. C. 432. In passing upon such bequests, the soundness of the idea of purgatory is not in issue. Masses may or may not effect their purpose, "but the law has no care for contrariety of faith as to spiritual things": *Harrison v. Brophy* (Kan., 1898); and persons professing the Roman Cath-

olic faith are entitled in law to the same respect and protection in the religious observances thereof that other denominations are accorded: *Holland v. Alcock*, 108 N. Y. 312; 2 Am. St. Rep. 420; *Sherman v. Baker* (R. I., 1898); *Rhymer's Appeal*, 93 Pa. St. 142; 39 Am. Rep. 736; *In re Schouler*, 134 Mass. 426; *Kerrigan v. Tabb* (N. J. E., 1898).

Thus it appears that bequests or devises for masses are not infected with invalidity of purpose. It is when we inquire as to the proper method of attaining their purpose that we find the cases somewhat at variance. One class of cases holds that they are good as charitable trusts, being for religious services. Another class holds that they are private trusts, which are void because there is no living beneficiary to enforce the trust. A third class holds that they are good as outright gifts for a specified legal object: *Sherman v. Baker* (R. I. 1898).

Charitable Trusts for Religious Purposes.—In *In re Schouler*, 134 Mass. 426, the bequest was directly to a Catholic priest, who was authorized to withdraw the contents of the testatrix' bank-book, and to use the same to defray burial and funeral expenses of the testatrix, "and the residue for charitable purposes, masses, et cetera." It was held that the bequest created a valid public charity, and that, the nominated trustee having died without qualifying, the court would appoint a person to execute the trust. In *Rhymer's Appeal*, 93 Pa. St. 142, 39 Am. Rep. 736, a similar bequest was adjudged to be to a religious use and void under a statute prohibiting such bequests. "It cannot be doubted," said the court, "that in obeying the injunction of the testator and offering masses for the benefit and repose of his soul, the officiating priest would be performing a religious service." Similarly, in *Kerrigan v. Tabb* (N. J. Eq., 1898), a legacy to a priest to be expended for masses for the repose of the testatrix' soul was held to be to a religious use and valid under the constitution, and, the trustee named by the testatrix having died before her, a new trustee was appointed to carry out the trust. Where a bequest was directly to trustees to invest for the benefit of a designated Catholic church, wherein masses should be said yearly for the benefit of a testator's soul, it was held valid for a charitable use: *Seda v. Huble*, 75 Iowa, 429, 9 Am. St. Rep. 495. the mention of masses being held a mere request. The doctrine of charitable uses has been declared to be a part of the law of Illinois, and a bequest to a designated church for masses for the repose of the souls of persons named was upheld as creating a valid charitable trust. "A bequest for such special purpose merely adds a particular remembrance to the mass," said the court, "and does not, in our opinion, change the character of the religious service and render it a mere private benefit. While the testator may have a belief that it will benefit his soul, or the souls of others doing penance for their sins, it is also a benefit to all others who may attend or participate in it": *Hoeffler v. Clogan*, 171 Ill. 462, 63 Am. St. Rep. 241, wherein the authorities are collected and exhaustively discussed.

Treated as Private Trusts.—In the principal case, the bequest was held to create a trust, invalid, because there was no definite beneficiary named who could come into court and enforce the performance of the trustee's duties under the trust. To the same effect is *Festorazzi v. St. Joseph's Catholic Church*, 104 Ala. 327, 53 Am. St. Rep. 48, where the court said: "It is not valid as a private trust for the want of a living beneficiary. A trust in form, with none to enjoy or enforce the use, is no trust." In *Holland v. Alcock*, 108 N. Y. 312, 2 Am. St. Rep. 420, this same conclusion was reached after elaborate discussion, and the testator held intestate as to his residuary estate, which he had bequeathed to trustees, to be applied in having prayers offered for "the repose of my soul and the souls of my family, and also the souls of all others who may be in purgatory." This objection to sustaining such bequests as private trusts has not always been considered insuperable. "Given a legal bequest, not personal to the legatee or to his use, and it is hard to see why it should not be enforced as a trust. The answer that there is no one in interest to have a standing in court is met by the rejoinder that an heir at law of the testator has a sufficient interest to see that the will is carried out": *Sherman v. Baker* (R. I. 1898). "A bequest for the erection of a public statue or monument to a distinguished person is a good charitable bequest, and yet such person, if deceased, could not enforce its execution, but the courts could and would do it": *Hoeffler v. Clogan*, 171 Ill. 462; 63 Am. St. Rep. 241. In *Moran v. Moran*, 104 Iowa, 216, post, p. 443, it was held that a bequest to the pastor of a designated church, for masses, while not a charity, created a valid private trust. The court criticises *Festorazzi v. St. Joseph's Catholic Church*, 104 Ala. 327, 53 Am. St. Rep. 48, and says: "We have said that this bequest, if the priest should accept the money, is a private trust; and we think it possesses the essential elements of such a trust, as much as it would if the object were the erection of a monument or the doing of any other act intended alone to perpetuate the memory or name of the testator. But even if there is a technical departure because of no living beneficiary, still the bequest is valid": See, also, *Matter of Hagenmeyer's Will*, 12 Abb. N. C. 432; *O'Conner v. Gifford*, 117 N. Y. 281.

Treated as Direct Gifts for a Legal Purpose.—Although refusing to uphold the bequest for masses in the principal case, the court admitted that, "had the testator made a plain, direct bequest of the sum in question to Bishop Messmer, or to any bishop or priest, for masses for the repose of the souls of the persons named in his will in that behalf, it would certainly be our duty to declare it valid and give full effect to it." Here, it appears from the cases, we have an effective method for executing such bequests, though the wording of the will is exceedingly important. Thus in *Festorazzi v. St. Joseph's Catholic Church*, 104 Ala. 327, 53 Am. St. Rep. 48, the bequest was of money "to be used in solemn masses for the repose of my soul." The money was given and bequeathed to the church for that purpose, but the court refused to sustain the bequest as being directly to the church for its general purposes. In *Harrison*

v. Brophy (Kan. 1898), a residuary sum was bequeathed in the following language: "I give and bequeath to Rev. James Collins, for mass for his grandfather's and grandmother's soul." This was construed to be a direct gift to the donee, and sustained as such. The objection to its validity upon the ground of uncertainty as to the beneficiaries was thus obviated.

The wordings of the two bequests just quoted scarcely give us any reason for the difference in the holdings of the two cases, except to indicate the necessity of clear and unmistakable terms showing an intention to make a direct gift. The distinction drawn between the bequests is recognized by the court in *Holland v. Alcock*, 108 N. Y. 312; 2 Am. St. Rep. 420. In *Sherman v. Baker* (R. I. 1898), a bequest to the parish priest of St. Patrick's church at Valley Falls "to say masses for me" was held valid as an outright gift for a specified legal object, though it did not contain all the elements of a valid trust. This distinction is approved also in *Hoeffler v. Cloghan*, 171 Ill. 462; 63 Am. St. Rep. 241; and while the validity of such bequests has not been passed upon in all the states, and the reported cases are not in harmony, it appears that of all the methods that one may adopt to effect a valid bequest for masses for the repose of his soul, the last method discussed, namely, a direct gift to a designated person with a proper request attached to it, is least open to objection.

HAZELTON v. DOUGLAS.

[97 WISCONSIN, 214.]

GUARDIAN AND WARD—BOND WHERE THERE IS NO ORDER OF APPOINTMENT.—A bond given by a person as the guardian of a minor, by which he obtains possession of the property of his supposed ward, is valid and enforceable, though it appears that no formal order was ever made appointing him such guardian.

GARNISHMENT—SUBROGATION BY REASON OF.—One who obtains judgment against a ward and garnishes his guardian becomes subrogated to the claims of the ward against the guardian to the amount of such judgment.

PARTIES.—IN A SUIT FOUNDED UPON a garnishment, it is not necessary to make either the judgment debtor or his debtor parties, where the object of the suit is to reach property or moneys transferred to the defendant therein by the judgment debtor.

Action against Douglas as principal, and Rice and Mitchell as sureties upon a guardian's bond. The bond in question was executed by the principal as the guardian of Marion V. Dudley, and thereupon he obtained possession of her real estate, but it afterward appeared that no valid order had been made appointing him as guardian. The plaintiff, Hazelton, recovered judgment against the ward after her coming of age, and afterward recovered judgment against Douglas as garnishee. Douglas re-

fused to pay, and prior to the commencement of the suit transferred part of the trust property, more than sufficient to pay the plaintiff's claim, to the defendants, Rice and Mitchell, who were his sureties. The complaint was demurred to on the ground that there was a defect of parties in not joining Douglas as a party plaintiff, and in omitting Mrs. Dudley as a party defendant. The demurrer was overruled, and the defendants appealed.

Carney, Clasen & Welsh, for the appellants.

G. W. Hazelton and W. J. McElroy, for the respondent.

²¹⁷ WINSLOW, J. The complaint shows that Douglas never was the legal guardian of Mrs. Dudley, although a formal order had been made appointing him. It was supposed, however, that he was her guardian, and he gave his bond, with the defendants as his sureties, and by means thereof obtained possession of twenty thousand dollars' worth of property. The bond was given voluntarily. It contravened no statute. It was not even repugnant to the policy of the law. It induced the delivery to the principal of the supposed ward's entire fortune. It was, within the rule of a vast number of authorities, a good voluntary bond in the hands of Mrs. Dudley. To hold otherwise would be to do rank injustice: 1 Brandt on Suretyship and Guaranty, secs. 22, 23; Lewis v. Stout, 22 Wis. 234; Klauber v. Charlton, 45 Wis. 600; United States v. Tingey, 5 Pet. 115.

By virtue of the judgment obtained by the plaintiff against Mrs. Dudley and the garnishment of Mr. Douglas the plaintiff has undoubtedly become subrogated to the rights of Mrs. Dudley to the amount of his judgment. Such subrogation operates precisely as an assignment by Mrs. Dudley to him of so much of her claim against Douglas. It follows that a good cause of action is stated.

It is manifest that there is no defect of parties plaintiff or defendant.

By the Court. Ordered affirmed.

GUARDIAN AND WARD—ACTION UPON GUARDIAN'S BOND—ESTOPPEL.—A recital in a guardian's bond of the fact that he is such guardian is binding both upon himself and his surety in an action on the bond: Fridge v. State, 3 Gill & J. 103; 20 Am. Dec. 463. The sureties are estopped by the recitals in the bond to deny the validity of the guardian's appointment, where he, by virtue of his qualification as guardian, had taken possession of his ward's estate and exercised control over it for many years: Hauenstein v. Gillespie, 73 Miss. 742; 55 Am. St. Rep. 569, and note.

MEYER v. BARTH.

[97 WISCONSIN, 85.]

JUDGMENT AGAINST PRINCIPAL—EFFECT OF AS AGAINST SURETIES.—Sureties upon a probate bond are, in the absence of fraud or collusion, concluded by the decree of a proper court rendered upon an accounting of their principal.

PRACTICE.—THE OBJECTION THAT THE PLAINTIFF HAS NOT LEGAL CAPACITY to sue, if not taken by answer or demurrer, is waived.

Action commenced against the sureties upon a bond of a trustee of a testamentary trust. The trustee was removed at the instance of his sureties, and thereafter filed an account of his trusteeship, which was settled by a decree of the proper court, but it was insisted that such decree was not conclusive upon the sureties. Judgment for the plaintiff; defendants appealed.

Timlin & Glicksman and Julius F. Roehr, for the appellants.

O. T. Williams & Coleman, and Rogers & Mann, for the respondent.

355 WINSLOW, J. Whatever may be the rule in other jurisdictions, this court has definitely adopted the rule that sureties upon a probate bond are, in the absence of fraud or collusion, concluded by the decree of the proper court, rendered upon an accounting by their principal, as to the amount of the principal's liability; and this is the rule even though the sureties be not parties to the accounting; *Shepard v. Pebbles*, 38 Wis. 373; *Holden v. Curry*, 85 Wis. 504; *Schoenleber v. Burkhardt*, 94 Wis. 575. The same rule prevails in many courts: *Heard v. Lodge*, 20 Pick. 53; 32 Am. Dec. 197; *Stovall v. Banks*, 10 Wall. 583; *Irwin v. Backus*, 25 Cal. 214; 85 Am. Dec. 125; *Smith v. Smithson*, 48 Ark. 261; *Martin v. Tally*, 72 Ala. 23; *Housh v. People*, 66 Ill. 178. It is not alleged in the present case that there was any fraud or collusion in Koetting's accounting before the county court. Therefore, when, upon that accounting, the county court adjudged that on the third day of March, 1896, there was due from Koetting to the estate of Lurinda Shepardson fifty-nine thousand five hundred and fifty-seven dollars and eighty-one cents, the question as to the amount of Koetting's liability as trustee was conclusively settled, both as to Koetting and as to the sureties upon his bond. We do not need therefore, to examine or discuss a number of questions which are discussed by counsel relating to the amount of Koetting's default. Those questions were

closed by the ³⁵⁶ decree rendered upon the accounting, and cannot be opened in this action. This was the conclusion reached by the superior court, and it thereupon rendered judgment for the plaintiff for the amount of the deficiency found by the county court, with interest from the date of that judgment, and this was manifestly right.

A point was made that the action should have been prosecuted by the county judge, under the Revised Statutes, section 4014, subdivision 4, and section 4015. We do not regard the point as of merit. The funds must, when recovered, go into the hands of Meyer, to hold as trustee; and he is, in his representative capacity, the real party in interest. Conceding the point to have been technically well taken, no objection was made by answer or demurrer, the point being raised by objection on the trial for the first time. It is, in effect, an objection that the trustee has not legal capacity to sue; and this must be taken by demurrer or answer, or it is waived. It is, in principle, much like the case of *Webber v. Ward*, 94 Wis. 605.

By the Court. Judgment affirmed.

JUDGMENT—CONCLUSIVENESS — PRINCIPAL AND SURETY.—Judgments and decrees bind parties and privies only, and privity exists only where there is identity of interest: *Winston v. Westfeldt*, 22 Ala. 760; 58 Am. Dec. 278. The sureties of an administrator are in privity with him: *State v. Coste*, 36 Mo. 437; 88 Am. Dec. 148, and note. A judgment against a guardian was held conclusive upon his sureties in *Douglass v. Ferris*, 138 N. Y. 192; 34 Am. St. Rep. 435, and note. But a judgment against a person indemnified is conclusive in a suit against his indemnitor only as to the facts thereby established: *St. Joseph v. Union Ry. Co.*, 116 Mo. 636; 38 Am. St. Rep. 626, and note. See monographic note to *Charles v. Hoskins*, 83 Am. Dec. 380-390.

PLEADING—DEFECT OF PARTIES—WAIVER OF OBJECTION.—Defect or misjoinder of parties appearing upon the face of the complaint is a ground of demurrer, and when not appearing on the face of the complaint, objection thereto may be taken by answer. If no such objection be taken either by answer or demurrer, it is waived: *Great West. Min. Co. v. Woodmas etc. Min. Co.*, 12 Colo. 46; 13 Am. St. Rep. 204, and note.

PORMANN v. WALSH.

[97 WISCONSIN, 356.]

UNDER A BUILDING CONTRACT providing that work is to be done or materials furnished to the entire satisfaction of the architect and also to the satisfaction of the owner, no recovery can be had if the owner is not satisfied, though the architect is, unless

the dissatisfaction of the owner is shown to be capricious and unreasonable.

BUILDING CONTRACTS.—If a builder accepts payment of a contract with the understanding that no further payment shall be made unless he has made satisfactory certain plastering objected to, he cannot maintain any action unless he complies with the understanding by making such plastering satisfactory.

A. J. Eimermann, for the appellant.

Sylvester, Scheiber & Orth, for the respondents.

³⁶² PINNEY, J. 1. The evidence clearly sustains the findings of the circuit court. The only question worthy of particular consideration is whether the plaintiff was entitled to recover one hundred and twenty-five dollars, the unpaid portion of the contract price which was to be paid to the plaintiff for performing the contract, and what effect should be given to that part of the contract which provides "that the work done and materials furnished shall be to the entire satisfaction of Fred. Graf, who is hereby declared to be the superintendent of the building, and to the satisfaction of the owner," and the certificate of the architect that the contractor was entitled to specified payments "subject to owner's approval." It is contended on the part of the defendant that by the contract such approval on his part was a condition precedent to recovery for work done under it, as well as the certificate of the architect. We know of no reason why the parties might not lawfully make the contract in this respect as they did in the present case, or why it should not be enforced as made. In Hudson on Building Contracts, second edition, 274, it is said: "Work is sometimes agreed to be done to the approval of the engineer and the employer, and sometimes to the approval of the engineer only. In the former case, the engineer may disapprove or approve unreasonably, and his approval would be a condition precedent to payment. The only benefit to a building owner of such a condition is, that if the architect approves unreasonably, to the detriment of the building owner, the building owner might still disapprove, but only reasonably; and it would seem unreasonable for him to disapprove (fraud or collusion apart) when his architect has approved, inasmuch as by the selection of the architect he has fixed the standard by which ³⁶³ the work is to be tested. The builder could bring an action (in the event of the employer's disapproval), and it would be a question for the jury whether the work was reasonably in accordance with the contract." The evidence disclosed abundant cause for the owner's refusal to withhold his

approval of the work. The plaintiff insists that the certificate of the architect is conclusive, and that it is not a condition precedent to a recovery of the unpaid portion of the contract price that the work had been done "to the satisfaction of the owner." We do not see any ground upon which the court can refuse to give full force and effect to this provision of the contract as the parties have written it. If the contractor fairly obtains the certificate of the architect, the building owner cannot unfairly and capriciously withhold his approval or satisfaction with the work, so as to defeat a recovery for proper performance.

2. With respect to the one hundred and twenty-five dollars claimed by the plaintiff, he substantially entered into a new agreement by signing the indorsement on the last certificate, to the effect that the amount of that certificate (two hundred dollars), which was paid to him, was received "on the express understanding that the defective plastering will be made perfectly satisfactory before any further payment is made." We are unable to see any ground upon which the plaintiff, in view of the circumstances, can recover the one hundred and twenty-five dollars claimed, and it follows that the judgment of the circuit court must be affirmed.

By the Court. The judgment of the circuit court for Milwaukee county is affirmed.

CONTRACTS — PERFORMANCE TO SATISFACTION OF PARTY.—A contract to do work upon property to the entire satisfaction of its owner, and in the best workmanlike manner, is satisfied by doing such work in a good and workmanlike manner. The owner cannot avoid payment by arbitrarily and unreasonably saying that he is not satisfied: *Doll v. Noble*, 116 N. Y. 230; 15 Am. St. Rep. 398. The satisfactoriness of the completed work is to be determined by the mind of a reasonable man, and not by the private taste or liking of the owner: *Hawkins v. Graham*, 149 Mass. 284; 14 Am. St. Rep. 422, and note.

MADISON *v.* MAYERS.

[97 WISCONSIN, 399.]

STREETS—ACTUAL LOCATION OF, CONTROLS.—In the absence of original monuments which can be ascertained, the location and occupancy of a street as indicated by old buildings and fences, and by its use for many years, must control as a practical location of the street, and is a practical construction of the plat thereof. The lands included in the street as thus used must be regarded as dedicated to the public use.

STREETS—PARTIAL OCCUPANCY AND USE OF.—The fact that a street was never worked or fitted for travel clear to the south line thereof does not prevent the municipality from working and fitting it for travel up to such line whenever it may choose.

STREETS.—MERE NONUSER of a part of a street cannot operate as a surrender or abandonment of any part of it for the purpose of a public street.

STREETS—MUNICIPAL CORPORATIONS, RIGHT TO IN. A city has a right to maintain a suit to prevent an abutting property owner from removing stone, earth, and other materials from within the limits of a street and from impairing an embankment situated therein, or from making it more difficult or expensive to fit the whole width of the street for travel.

STREETS.—A TOWN PLAT IS NOT CONCLUSIVE that there is a strip of land, as there represented, between a street, and the shore of a lake. The dimensions of the several lots as they appear on the plat must yield to the actual condition of things as they exist, and be determined by the practical location and construction of the plat upon the ground.

MUNICIPAL CORPORATIONS—RIGHT TO FORBID THE FILLING IN OF A LAKE.—Though a city has been given power to enact ordinances for the benefit of trade, commerce, and health, and to provide for the abatement and removal of nuisances, it is not thereby authorized to restrain the filling in of a lake not constituting any part of the public street.

RIPARIAN PROPRIETORS—RIGHT TO CONSTRUCT WHARVES AND PIERS.—Owners of land in a city between a street and the shore of a lake have the right to construct in front of their respective lots, in shoal water, proper wharves, piers, and booms in aid of navigation, without obstructing it, far enough to reach water navigable for such boats as are in use or appropriate to the lake.

MUNICIPAL CORPORATIONS—PUBLIC NUISANCES OR PURPRESTURES.—A municipal corporation, within whose limits is a lake, has no more right to remove, or to compel the removal of, a purpresture or public nuisance therein than has a private individual. Its removal can be compelled only by some proceeding instituted by the state.

John A. Aylward, city attorney, and R. M. Bashford, for the appellant.

Erdall & Swansen and W. R. Bagley, for the respondent.

⁴⁰⁶ CASSODAY, C. J. The complaint alleges, in effect, that Spaight street, between Patterson and Livingston streets, ⁴⁰⁷ was regularly laid out, platted, and recorded, and is sixty-six feet wide, and was and is traveled, and runs along the south side of block 149. The several answers allege that the street was established and dedicated under and by virtue of the Doty plat, duly executed and recorded May 7, 1837; that November 27, 1868, the common council of the city widened the street by extending the northerly boundary thereof, opposite lots 4, 5, 6, 7, and 8 in block 150, into block 149, as therein stated; that December 4, 1868, the common council vacated the portion of

the street therein described, along a part of the south side of block 149; and that the several lots in block 150 were platted by that same Doty plat. Thus, it was expressly claimed by all the parties to this action that the section of Spaight street in question was originally established by a recorded plat or plats, and that the same ran along the south line of block 149, or between blocks 149 and 150, as designated on such plat or plats. The court found that it was a public street, "and extends between blocks 149 and 150," but that it was such only by virtue of being used, worked, and traveled for many years. The court then found that the true location of that street, according to the various plats, was a number of feet north of the present north line of the street. Since the present north line of the street is some eight feet in the narrowest place, and some thirty-two feet in the widest place, north of the original south line of block 149, it is obvious that the court thus found that "the true location" of that section of the street was not between blocks 149 and 150, as previously found, and as claimed by all parties, but "a number of feet north of the present north line" of the street (that is to say, across some of the lots in block 149, or entirely north of that block). Counsel was asked on the argument how many feet north of the present north line of the street the trial court, by such finding, had in mind as the true location of the street, according to the various plats, and his answer was, "About two hundred feet." Such ⁴⁰⁸ finding seems to be based upon the testimony of one of the surveyors to the effect that he had recently measured the distance on Patterson street from the shore line of Third Lake to the shore line of Fourth Lake, and found it to be four thousand and forty-four feet; that such distance, as indicated by the Pritchette plat of 1839, as near as he could ascertain it, was three thousand seven hundred and sixty-two feet (that is to say, two hundred and eighty-two feet less than the true distance); and that, not with reference to where it is laid out, but, according to that plat, the true location of Spaight street was approximately something over two hundred feet north from where it is at present.

Of course, if the true location of the street, according to the plat, would be two hundred feet north of where it now is, then the true location of block 149, according to the plat, would be still further north of such true location, and that would necessarily place block 150 where block 149 is now. That would necessarily, according to the plat, disarrange, not only

the balance of Spaight street, but other streets in the vicinity, and besides would be likely to unsettle numerous titles. The city engineer testified to the effect that there were no original monuments, either natural or made, in the city, except one in the capitol park, and that he thought no one had ever been able to find that; that there was no plat which covered the entire city which would agree with the land as laid out over the entire city; that he used a map made by McCabe, city surveyor, June 16, 1868, of the street and block 149 in question, attached to the petition for widening the street; that that map agreed with the Pritchette plat, recorded in the register's office in 1839; that there was a discrepancy between the two Doty plats and the Pritchette plat, as to the location of the street in question, varying from nothing to twenty-odd feet; that such discrepancy was owing to the fact that the Pritchette plat put the west end of the section of the street in question further south, and the east end of such section further north, than either of the ⁴⁰⁰ Doty plats; that he assumed that the Pritchette plat was evidence that the original land had been staked out in accordance therewith; that in making the map in evidence, of the premises in question, he resorted to old fences, old buildings, and the streets, as laid out and used for many years, as indicating the lines evidently established by former surveys in the city; that the Pritchette plat gives no dimensions, but that after he discovered that the McCabe plat practically agreed with it, and that that did give dimensions, he took those dimensions as being the true dimensions as originally staked out in block 149; that he assumed that the streets and blocks, as laid out, had approximately been accurately laid out by former surveyors; that the surveys he made in that part of the city correspond with those made by Captain Nader and Professor Conover; that as his starting point in locating block 149, he took the stake located by Captain Nader, after verifying the same to see that it was correct; that that gave him the south line of Jenifer and the west line of Patterson streets, and the corner of block 149; that assuming that those two streets were accurately laid out, then block 149 would correspond with the Pritchette plat, with the exception of the widening of Spaight street mentioned; that the plat indicates that all regular lots are sixty-six feet wide, and all streets sixty-six feet wide, but, as a matter of fact, some of the lots run over more or less; that, if such actual distances were to control, houses would soon be in the streets, and streets in the lots, and so,

in making the survey, he tried to ascertain from the streets, as laid out and the fences and buildings, as they were located, where the street actually was on the ground, as laid out on the plat. Such evidence as to the practical location of the section of Spaight street in question, as actually laid out under the plats, does not seem to be overcome by any thing in the record—certainly not by the mere fact that the actual distance between the respective shores of the two lakes on the ⁴¹⁰ line of Patterson street is two hundred and eighty-two feet greater than it would appear to be by the Pritchette plat.

The question recurs whether, under the evidence and the admissions in the pleadings, the trial court was justified in holding that such section of Spaight street was never dedicated to the public as a street by any of such plats, and that it was never laid out, located, or established as such at the point or points fixed by such plats, but was a public street only by virtue of having been used, worked, and traveled as a street for many years. It is sixty years since the Doty plat was recorded, and fifty-eight years since the Pritchette plat was recorded, and twenty-nine years since the McCabe map was made. Those two plats, as to the premises in question, differ from each other as indicated, yet such difference is too slight to prevent a practical location of the street under the Pritchette plat. It appears that Spaight, Livingston, Patterson, and Jennifer streets have each and all been actually located, opened, and traveled for a period of forty years or more, that block 149 is between those streets, and that during that time lots in that block and other blocks in the vicinity have been occupied by persons residing thereon. In the absence of any original monuments which can be ascertained, as indicated, such locations and occupancy, and the lines and corners of such streets and blocks thereby established, as indicated by old fences, old buildings, and the streets as so laid out and used for many years, and stakes and monuments established by former surveyors, were competent evidence, as tending to prove—and in our opinion do clearly prove—that the section of Spaight street in question was more than forty years ago actually located and laid out under and pursuant to the Pritchette plat, and hence the same was a practical construction of that portion of that plat. Numerous authorities might be cited in support of that proposition: *Marsh v. Mitchell*, 25 Wis. 706; *Nys v. Biemeret*, 44 Wis. 104; *Racine v. J. I. Case Plow Co.*, 56 ⁴¹¹ Wis. 539; *State v. Schwin*, 65 Wis. 207; *Miner v. Brader*, 65 Wis. 537;

Hrouska v. Janke, 66 Wis. 252; *Koenigs v. Jung*, 73 Wis. 178; *Racine v. Emerson*, 85 Wis. 80; 39 Am. St. Rep. 819; *Riley v. Griffin*, 16 Ga. 144; 60 Am. Dec. 726. Thus, in one of the cases cited it was held that: "In ascertaining the true location of the streets, lots, and blocks in a city, according to the plat and survey thereof, regard is to be had: 1. To the natural monuments referred to therein; and 2. To the artificial monuments placed by the surveyor to mark lines or boundaries, before resorting to the courses and distances marked on the plat or survey. If no monuments are mentioned or in existence, evidence of long-continued occupation, though beyond the given distance, is admissible. If the description is ambiguous or doubtful, parol evidence of the practical construction given by the parties by acts of occupation, or recognition of monuments or boundaries, is admissible." Courts have gone still further, and held, in effect, that a competent surveyor, may as a witness in a proper case and under proper circumstances, give his opinion as to whether certain piles of stone and certain mark or marks on trees were made by a surveyor, and indicated a boundary line: *Davis v. Mason*, 4 Pick. 156; *Knox v. Clark*, 123 Mass. 216; *Brantly v. Swift*, 24 Ala. 390; *Clegg v. Fields*, 7 Jones, 37; 75 Am. Dec. 450. Certainly, a mere discrepancy in distance is not to overcome such practical location of the street under and in pursuance of the plat.

We must hold, upon the evidence in the record as well as the pleadings, that the section of Spaight street in question was so laid out and opened under and in pursuance of the Pritchette plat, and that the recording of that plat was a dedication of such street to the public, and that such dedication covered and included the whole width of that street as indicated on that plat.

2. The mere fact that the eastern portion of that section of the street was widened by extending the same north into ⁴¹² block 149, as mentioned, and that the western portion thereof was narrowed by vacating a piece on the north side of the street as mentioned, in no way changed the south line of the street, as located under that plat.

3. Nor does the fact that that section of the street was never worked or fitted for travel clear to the south line thereof, nor at all south of the iron railing or fence mentioned in the pleadings and findings, prevent the city from working and fitting the same for travel clear to the south line thereof as located under the Pritchette plat, whenever it may choose to

do so. It is well settled that no mere nonuser of that side of the street for the time mentioned can operate as a surrender or abandonment of the same for the purposes of a public street: *Reilly v. Racine*, 51 Wis. 526; *State v. Leaver*, 62 Wis. 387; *Childs v. Nelson*, 69 Wis. 125; *Maire v. Kruse*, 85 Wis. 302; *Nicolai v. Davis*, 91 Wis. 370. In this last case, it was held that "the mere fact that the plaintiff had for many years encroached upon the road, by putting a portion of his fences in the road and otherwise, did not bar the town from the legal right of having the road at any time opened to its full width as originally surveyed and laid out." It follows from what has been said that the space between the iron railing or fence and the south line of the street, as so located under the plat, was at the time of the commencement of this action, and is now, a part of Spaight street, and may be worked and fitted for public use as a part of the street whenever the city may choose to do so.

4. The several defendants, as abutting lotowners, except Kerns, justified what they had done, respectively, in respect to removing stone, earth, and other materials from within the limits of the street as so laid out, by claiming that they severally owned the land clear up to the iron railing or fence, and that the street did not extend south of that railing or fence, and the findings of the court are in harmony with such claim. From what has been said, it is obvious ⁴¹³ that such ruling was erroneous. The question recurs whether the city has such an interest in that branch of the relief demanded as to maintain this action. The right of the city in the space between the iron railing or fence and such south line of the street as so located being as stated, it follows, under the repeated decisions of this court, that the city has such an interest therein that it may maintain this action so far as to restrain the respective defendants, as abutting lotowners, from so removing stone, earth, and other materials from within the limits of such street or from impairing the embankment of the street as it now exists, or making it more expensive and difficult to fit the whole width of the street for travel. To that extent the injunction should have been made perpetual. In support of this proposition it is only necessary to cite the following cases: *Waukesha Hygeia Mineral Spring Co. v. Waukesha*, 83 Wis. 475; *Neshkoro v. Nest*, 85 Wis. 126; *Eau Claire v. Matzke*, 86 Wis. 291; 39 Am. St. Rep. 900.

5. Counsel contend, in effect, that block 150 on the plat is

itself a monument, and that, according to that plat, there appears to have been a strip of land between the section of Spaight street in question and the lake shore, for the whole distance, which is divided up into lots numbered from 1 to 9, inclusive, and hence that the plat should be so construed and modified as in some way to satisfy such calls of land for such lots. But the fact remains that the whole of block 150 is south of Spaight street on the plat, and hence is necessarily south of it, as actually located under and in pursuance of the plat. In other words, the location of the streets, as mentioned, necessarily located that block. Certainly, the several owners of land between that street, as so located, and the lake shore, have all the rights of abutting owners upon the street, and also all the rights of riparian owners on the shore of the lake. But if there is any defendant who owns no land between the street, as so located, and the shore of the lake, then we are unable to perceive upon what theory ⁴¹⁴ he could properly be regarded as an abutting owner or riparian owner. A mere mistake as to the quantity or shape of the land in the block, or as to whether the shore of the lake at some particular point was within the limits of the street, cannot be allowed to frustrate the plat, as such mistake comes within the well-recognized maxim, *Falsa demonstratio non nocet*: *Sherwood v. Sherwood*, 45 Wis. 364; 30 Am. Rep. 757; *Paine v. Benton*, 32 Wis. 496; *Dupont v. Davis*, 30 Wis. 175; *Kennedy v. Knight*, 21 Wis. 347; 94 Am. Dec. 543. The dimensions of the several lots in the block, as they appear upon the plat, must, like other courses and distances, yield to the actual condition of things as they existed, and be determined by the practical construction and location of the plat upon the grounds.

6. There is another branch of this case. The complaint alleges, in effect, that the city has jurisdiction over the entire surface of the lake, that the defendants have placed stones, earth, and other materials in the waters of the lake, not only within the limits of the street, but outside of, and beyond the limits of, the street, even to the distance of sixty or seventy feet from the south line of that street, and prays an injunction to restrain the defendants from so filling in the lake. The several answers allege, and the court found, in effect, that such jurisdiction of the city over the lake was for limited and special purposes only, but not for any of the purposes set forth in the complaint. So far as the right of the city to work and prepare the street for travel for the whole width thereof, even

where the shore of the lake may be within the limits of the street, enough has already been said. But the question recurs as to whether the city may properly, in this action, restrain the defendants from so filling in the lake outside and beyond the limits of the street.

The provisions of the charter, cited in the brief of counsel, give the city power to enact ordinances for the benefit of trade, commerce, and health, and to provide for the abatement ⁴¹⁵ and removal of nuisances thereunder, and "generally to take such other measures for the public health as shall be deemed proper." Such police regulations may well be conceded, but they do not authorize the city to restrain the filling in of the lake in question, outside of the limits of the street. Under the repeated decisions of this court, there can be no question but that the title to the bed of the lake was and is in the state. But such of the defendants as own lots between the shore of the lake and the south line of the street have the rights of riparian owners on the shore of the lake. Such rights include the right of each to construct in front of his land, in shoal water, proper wharves, piers, and booms in aid of navigation, without obstructing it, far enough to reach water actually navigable for such boats as are in use or appropriate to the lake: *Cohn v. Wausau Boom Co.*, 47 Wis. 322; *J. S. Keator Lumber Co. v. St. Croix Boom Corp.*, 72 Wis. 82; 7 Am. St. Rep. 837; *Northern Pine Land Co. v. Bigelow*, 84 Wis. 163, 164; *Friewe v. Wisconsin State etc. Imp. Co.*, 93 Wis. 547, and cases there cited. Such right, however, is a private right, and is subordinate to the public right to navigate the lake, and may be regulated or prohibited by law: *Id.* Obviously, the city has no proprietary or corporate interest in the lake, nor the shore of the lake, outside of the limits of the street. Nor does it appear that the acts complained of are such as to affect the health of anyone. We are clearly of the opinion that the city has no such interest or right in the lake or the waters thereof, outside of the limits of the street, as to enjoin the defendants from the acts complained of: *Milwaukee v. Milwaukee etc. R. R. Co.*, 7 Wis. 85; *Sheboygan v. Sheboygan etc. Ry. Co.*, 21 Wis. 667; *Racine v. Crotsenberg*, 61 Wis. 481; 50 Am. Rep. 149; *Janesville v. Carpenter*, 77 Wis. 288; 20 Am. St. Rep. 123. In such a case, the right of the city to remove such a purpresture or public nuisance is no greater than that of an individual, and this court has expressly held that an individual could not remove the same: *Larson v. Furlong*, 50 Wis. 681. In England, such

purpresture ⁴¹⁶ or public nuisance was removable or abatable only by suit of the crown, having superintendence and control over public rights, at the instance of the attorney general: Gould on Waters, secs. 21, 167. In this country such right of action is in the state: Gould on Waters, secs. 93, 168. Thus, in *People v. Vanderbilt*, 28 N. Y. 396, 84 Am. Dec. 351, it was held that "the remedy to prevent the erection of a purpresture and nuisance in a bay or navigable river is by injunction at the suit of the attorney general": See, also, *People v. Davidson*, 30 Cal. 379. We must hold that the court properly refused to enjoin the defendants from filling in the lake outside of the limits of the street, and that as to that branch of the case the complaint was properly dismissed.

By the Court. The judgment of the circuit court is reversed, and the cause is remanded with direction to enter judgment in accordance with this opinion. In view of the fact that the findings of the trial court are sustained in part and set aside in part, costs and disbursements are allowed in favor of the plaintiff and against the defendants, except Kerns, for the expense of printing the case and for the fees of the clerk of this court, but no other costs or expenses are allowed to either party.

HIGHWAYS—WIDTH.—If the public has acquired the right to a public highway by user, the right carries with it such width as is reasonably necessary for the public easement of travel. See monographic note to *Whitesides v. Green*, 57 Am. St. Rep. 763, 764. The fact that an obstruction has been permitted to remain in a public street for a long time without objection, or that the street has never been used as such cannot estop the public authorities from removing such obstruction and opening and fitting the street for public use to its entire width: *Chase v. Oshkosh*, 81 Wis. 313; 29 Am. St. Rep. 898, and note.

HIGHWAYS—EFFECT OF NON-USER.—The question whether or not the right of a municipal corporation to lands dedicated to the public use for streets, highways, parks, and public places may be extinguished by nonuser or by operation of the statute of limitations, is one upon which there is a decided conflict of judicial opinion. See monographic note to *Orr v. O'Brien*, 14 Am. St. Rep. 278, discussing the conflicting cases, and monographic note to *Whitesides v. Green*, 57 Am. St. Rep. 766.

WHARVES—RIGHT OF RIPARIAN OWNERS TO BUILD.—A proprietor of lands fronting upon navigable waters has the right to connect himself therewith by means of wharves or channels extending from his uplands out to navigable water, so long as he does nothing to interfere with the free navigation of such water: *Prior v. Swartz*, 62 Conn. 132; 36 Am. St. Rep. 333, and note; *Chicago v. Van Ingen*, 152 Ill. 624; 43 Am. St. Rep. 285. See, also, *Sage v. Mayor*, 154 N. Y. 61; 61 Am. St. Rep. 592, and note; *Hedges v. West Shore R. R. Co.*, 150 N. Y. 150; 55 Am. St. Rep. 660, and note.

MAITLAND v. GILBERT PAPER COMPANY.

[97 WISCONSIN, 476.]

EVIDENCE OF THE EFFECT upon one of plaintiff's eyes of an injury inflicted directly upon the other is admissible.

EXPERT EVIDENCE IS NOT ADMISSIBLE TO PROVE what was the cause of an explosion of the water glass of a boiler, when the question before the jury is whether or not a valve was opened, or, if opened, whether such opening was sudden. Expert evidence may properly be received as to what would have been the effect of opening such valve suddenly, but experts should not be permitted to decide a question of fact, and any question asked an expert must be so framed as not to require him to pass on the credibility of any other evidence in the cause.

MASTER AND SERVANT—PROMISE TO REMOVE PERIL—WHEN SERVANT MAY RELY THEREON.—If a danger is disclosed by a servant to his master, which the latter promises to remove, the servant is not to be deemed to assume the risk of continuing in the employment, unless the danger is so great, constant, and immediate that no person of ordinary prudence would ordinarily subject himself to it for the limited time necessary for the master, with reasonable diligence, to remove it.

MASTER AND SERVANT—ASSUMPTION OF RISKS BY REMAINING WITH AN INCOMPETENT FELLOW-SERVANT.—If an engineer notifies his employer of the incompetency of a fireman, but is induced to continue in the service on the promise that such fireman will be removed, he does not assume the risk of injury from the incompetency of the fireman by remaining in the employment a reasonable time, relying on the promise that the fireman will be removed.

NEGLIGENCE—FINDING OF PROXIMATE CAUSE.—A verdict that the defendant was guilty of negligence which caused the injury is not sufficient. It must further find that such negligence is the proximate cause of such injury.

NEGLIGENCE—LIABILITY FOR. WHEN EXISTS.—There can be no recovery for negligence unless the injury complained of was the natural and probable result of it, and the attendant circumstances were such that a person of ordinary care ought reasonably to have apprehended that the injury might result from the negligence.

MASTER AND SERVANT—RETENTION OF INCOMPETENT SERVANT—LIABILITY FOR.—Though a master, after being notified of the incompetency of an employé, retains him in his employment, and from such incompetency an accident results, causing personal injury to a fellow employé, the latter cannot recover of the common master, unless he ought reasonably to have apprehended that the retention of the incompetent employé would, or might probably, imperil the personal safety of his coemployés.

MASTER AND SERVANT—INCOMPETENT SERVANT—ACTS OF FOR WHICH MASTER IS ANSWERABLE TO A FELLOW-SERVANT.—One employed as a fireman and having capacity to do the acts required of him as such may, nevertheless, be regarded as an incompetent employé for whose acts the employer is liable, where the incompetency is manifested in his not having sufficient capacity to understand and obey rules requiring him not to disturb other parts of the machinery with which he had nothing to do, and he, by violating these rules, imperils the safety of his fellow-employés.

MASTER AND SERVANT—INCOMPETENT SERVANT.—A MASTER IS NOT NECESSARILY LIABLE to one employé for injury resulting from the incompetency of another. If the master uses ordinary care in respect to employing competent servants, having regard to the character of the particular service and the consequences that may probably result from the incompetency of such servant, and an incompetent servant is nevertheless employed, a resulting injury to a fellow-servant cannot be legally chargeable to the master.

APPELLATE PRACTICE.—The action of a trial court in refusing to set aside a verdict as against the weight of evidence will not be reviewed unless so manifestly wrong as to amount to a clear abuse of judicial discretion, and this occurs ordinarily only when there has been practically no proper evidence which, if believed, would support the verdict.

Action to recover for injuries alleged to have been suffered by the plaintiff from the negligence of the defendant. The plaintiff, when injured, was in the employ of the defendant as an engineer. Under his supervision were firemen. There was attached to the boilers a water column to which was connected a water glass, intended to exhibit the height of the water in the boilers. A new glass was being put in place, and, while plaintiff was watching its proper adjustment, it burst suddenly, causing steam, hot water, and fragments of the glass to strike and injure his left eye, whereby it was destroyed. It was at first claimed that the defendant had been negligent in furnishing a defective and insufficient glass, but ultimately this claim was abandoned, and the plaintiff sought to rely upon the claim that a fireman named Frank Welk was incompetent, that notice of such incompetency had been given to the defendant, that the plaintiff continued in the employment, relying on the promise of the defendant to remove the incompetent and to employ a competent fireman, and that the injury was caused by the fireman carelessly opening and shutting a surface blow valve, thereby suddenly increasing the pressure in the boilers. The jury returned a special verdict, in which the questions asked and answers made were as follows: "1. Was the defendant guilty of negligence that caused the injury of the plaintiff? A. Yes. 2. Was the fireman Welk an incompetent person to discharge the duties of fireman? A. Yes. 3. Did the plaintiff inform Mr. Paul, the superintendent of the defendant, about ten days before the accident, that Welk was an incompetent person to discharge the duties of fireman? A. Yes. 4. If you answer the last question, 'Yes,' did the plaintiff continue in the employment of the defendant an unreasonable time after such notification and thereby assume the risk of such incompetency? A. No. 5. Did Welk suddenly open the surface blow-off valve at the time the plain-

tiff was examining the water gauge glass and was injured? A. Yea. 6. If you answer the last question, 'Yes,' did the sudden opening of the surface blow-off valve cause the bursting of the glass? A. Yea. 7. Was the plaintiff guilty of negligence that contributed proximately to the injury? A. No. 8. Did the plaintiff have authority to hire and discharge firemen of his own motion? A. No. 9. If the court should be of the opinion that the plaintiff is entitled to recover, at what sum do you assess his damages? A. Twelve hundred and fifty dollars." The fireman testified that he did not open the valve or go back to the end of the boilers at all. Verdict and judgment in favor of the plaintiff. There was a motion to set aside the verdict and for a new trial, but it was denied. The defendant appealed.

J. C. Kerwin, for the appellant.

Felker, Stewart & Felker, for the respondent.

⁴⁸³ **MARSHALL, J.** Evidence was allowed, under objection from defendant's counsel, respecting the effect on plaintiff's right eye of the injury to the left eye. The complaint charged that the direct injury from the breaking of the glass was to the left eye. We see no reason why evidence as to all the injuries to plaintiff, which flowed naturally from the destruction of the left eye, was not competent. The objection to the evidence was properly overruled.

Plaintiff was allowed, under objection, to answer the question: "What, in your opinion, was the cause of the explosion of the glass?" That was one of the most essential questions ⁴⁸⁴ the jury were to determine. True, whether the sudden opening of the surface blow-off valve, under the circumstances, would naturally tend to produce what occurred, was a question upon which expert evidence was proper. But the fact of whether the valve was opened, and, if opened, was opened suddenly, was in dispute on the evidence. Therefore, expert evidence should have been limited to opinions as to the effect of a sudden opening of the valve. When it went to the extent of passing on the whole case in respect to the fact in issue as did the question objected to, it went too far, and the allowance of it was error. Where evidentiary facts, upon which the fact in issue depends, are in dispute, opinion evidence as to the ultimate fact must be given upon a hypothetical case: *Luning v. State*, 2 Pin. 215; 52 Am. Dec. 153; *Wright v. Hardy*, 22 Wis. 348; *Kreuziger v. Chicago etc. Ry. Co.*, 73 Wis. 158. The rule is, that experts are not to decide issues of fact; hence, all ques-

tions calling for opinion evidence must be so framed as not to pass upon the credibility of any other evidence in the case, else it will usurp the province of the jury or the court: Jones on Evidence, sec. 374, and cases cited.

It was further assigned as error that the court denied defendant's motion to direct a verdict. The motion was based on the theory that plaintiff and Welk were fellow-servants and that the circumstances were such, if plaintiff is to be believed, that he assumed the risk of Welk's incompetency by remaining in the defendant's employ with knowledge thereof. The rule in *Erdman v. Illinois Steel Co.*, 95 Wis. 6, 60 Am. St. Rep. 66, is invoked to sustain the claim that plaintiff was guilty of contributory fault under the circumstances, notwithstanding he remained at his post, if such be the fact, on the faith of defendant's promise to remove the incompetent coemployé. There is no controversy but that, generally speaking, if an employé notifies the master of a special risk, as for instance that of the incompetency of a fellow employé, and objects to continuing in the master's employ on that account, but nevertheless ⁴⁸⁵ remains upon the faith of the master's promise to remove the special danger, for a reasonable length of time requisite to the performance of such promise by the exercise of reasonable diligence, the protesting employé cannot be successfully charged with contributory negligence on that ground. That is an exception, well established in the law of negligence, to the general doctrine that if an employé continues in the employ of the master with knowledge or reasonable means of knowledge of a special risk of so doing, he cannot recover from the master for an injury received by being exposed to such risk, on account of his contributory negligence. In *Erdman v. Illinois Steel Co.*, 95 Wis. 6, 60 Am. St. Rep. 66, a limitation of the foregoing exception to the general rule was recognized, which governed that case. Such limitation is just as well established in the law of negligence as the general rule itself or the exception thereto, as was there sufficiently demonstrated by reference to a multitude of authorities. Such limitation is to the effect that, notwithstanding the master's promise to remove the danger complained of, if the circumstances are so extraordinarily dangerous, so immediate and obvious, that a person of ordinary care would not ordinarily incur it, then the exception to the general rule does not apply. It only applies where the danger is not so great, constant, and immediate but that a person of ordinary prudence would ordinarily subject himself to

it for the limited time necessary for the master, with reasonable diligence, to remove it. Here Welk was working under the immediate supervision of plaintiff. It is by no means conclusive that the circumstances were such that plaintiff may not reasonably have supposed that he could so supervise Welk's conduct as to temporarily avoid any serious danger of his presence as a coemployé. The facts of the case come far short of the rule in *Erdman v. Illinois Steel Co.*, 95 Wis. 6, 60 Am. St. Rep. 66. There the employé, because of his own interest, deliberately went to work with a broken saw, revolving at great speed, to cut ⁴⁹⁸ bars of iron, under such circumstances that it was apparent that the saw was liable to fly in pieces at any moment and seriously imperil the personal safety of every person in the vicinity. The motion to direct a verdict was properly refused.

A large number of questions were submitted by defendant, relating to the subject of negligence in respect to the water-glass. The trial court withdrew that subject from the jury, leaving the charge of negligence resting wholly on the claim that defendant negligently retained in its employ an incompetent employé, after notice of his incompetence. So the refusal to submit questions covering any other subject of alleged negligence did not prejudice the defendant, hence does not constitute error.

This question was submitted by defendant's counsel and refused: "Was the opening of the surface blow-off valve the proximate cause of plaintiff's injury?" It was not claimed that the mere opening of the valve was the proximate cause of plaintiff's injury but that the negligent retention of the incompetent servant was such cause. If the circumstances of the case were such that the only inference that could be reasonably drawn therefrom was that, if Welk remained in defendant's employ, he was liable to do some act, or fail in some duty, that might probably imperil the personal safety of his fellow-servants, defendants, in the light of attending circumstances, ought reasonably to have foreseen that such might probably be the result of his retention, and that what followed was a natural and probable result thereof, then the fact found in favor of the plaintiff, in answer to the question proposed, would relate back to the negligent retention of the incompetent servant as the real producing cause of the accident, and make plaintiff's case perfect on the subject of proximate cause. The request for the question in the form proposed must be taken as an admission by defendant that the inferences referred to would follow a

finding ⁴⁸⁷ on such question in plaintiff's favor. As has often been held by this court, in some proper way, a finding as to the proximate cause was essential to plaintiff's recovery, unless the fact appeared by necessary inference from facts found or from the undisputed evidence.

Turning to the verdict, the answer to the first question merely found that the defendant was guilty of negligence which caused the injury. This court has repeatedly held that such a finding comes far short of determining the proximate cause. The question has been so many times discussed that we will not go over it again at this time. In *Deisenrieter v. Kraus-Merkel Malt-ing Co.*, 97 Wis. 279, all the important cases on the subject in this court will be found cited. The precise form of the finding under discussion was condemned as insufficient in *Andrews v. Chicago etc. Ry. Co.*, 96 Wis. 348. True, the trial court might have so instructed the jury as to make such question call for a finding of the proximate cause, but there was a failure so to do. On the contrary, an examination of the charge leads to the conclusion that the trial court submitted the case on the theory that if the jury found that the defendant was negligent and that such negligence caused the injury to the plaintiff, and plaintiff was free from contributory negligence, he was entitled to recover. The learned circuit judge said in regard to the question: "It goes to the gist of the action, and all the other questions are embraced within it." The meaning of such instruction cannot be misunderstood. If it means anything, it means that all the other questions go no further than the first in determining the facts essential to plaintiff's recovery, so far, at least, as relates to the defendant's fault. That overlooked entirely some of the essential elements of actionable negligence. It only exists where the part whose fault causes the injury was not only negligent, but the injury was the natural and probable result of it, and the attending circumstances were such that a person of ordinary ⁴⁸⁸ care ought reasonably to have apprehended that a personal injury to another might probably result from such negligence.

The other findings on the subject of negligence are that Welk was incompetent, that he was retained by defendant after notice of such incompetency an unreasonable length of time, and that the accident was caused by his suddenly opening the surface blow-off valve. That may be all true, and yet the bursting of the glass from such cause be such an extraordinary occurrence that it would not follow that a person of ordinary care,

in the light of attending circumstances, ought reasonably to have apprehended it. Neither does it follow, under the circumstances, conclusively, that defendant ought reasonably to have apprehended that the retention of Welk would or might probably imperil the personal safety of his coemployés. Therefore, the fact of proximate cause was not found by the jury, and does not follow as a conclusion of law from the facts found, and does not appear by the undisputed evidence. Hence, the court erred in not submitting the question suggested by the defendant, or some other question, calling for a finding of this essential fact, or in not so instructing the jury in respect to the first question as to make that cover the subject. On the case as it stands, the verdict is not sufficient to sustain a judgment, according to repeated decisions of this court.

The trial court refused to give the following instruction: "The mere fact that Welk generally was incompetent as a fireman will not authorize you to answer the first question, that the defendant was guilty of negligence; you must further find that the fireman Welk did some act which as a fireman it was improper for him to do, and which act directly and naturally caused the explosion of the glass. Unless these facts are established by a preponderance of the testimony you must answer the first question 'No.'" Also refused to instruct the jury, in substance, that, "unless they ^{also} found that Welk opened the valve in a negligent manner, that it was within the scope of his employment, and that it was the proximate cause of the plaintiff's injury, they must answer the first question 'No.'" And further, that "the undisputed facts show that if the fireman opened the valve it was not within the scope of his employment." If the purpose of such instructions was to inform the jury that the defendant was not chargeable with the negligence of Welk, unless it was in doing some act that he was required to do as fireman, they were properly refused. Incompetence is by no means confined to mere inability to do properly the particular work required. It goes to reliability in all that is essential to make up a reasonably safe person, considering the nature of the work and the general safety of those who are required to associate with such person in the general employment. A person may be competent to do the particular acts required of a fireman, yet be so careless in respect to obeying the rules that prohibit him from interfering with appliances not connected with his work, as to render him an exceedingly dangerous and incompetent person to be associated with. The rule is tersely stated in the

opinion of Mr. Justice Brown in *Coppins v. New York etc. R. R. Co.*, 122 N. Y. 557, 19 Am. St. Rep. 523, substantially thus: "A competent man is a reliable man. Incompetency exists not alone in physical or mental attributes, but in the disposition with which a person performs his duties, and though he may be physically and mentally able to do all that is required of him, his disposition toward his word, and toward his employer, and toward his fellow-servants, may make him an incompetent man." So here, though it may be true that Welk had sufficient capacity to do the acts required of him as a fireman, yet if he had not sufficient capacity to understand and obey rules which required him not to disturb parts of the machinery with which he had nothing to do, and which he was prohibited from touching, a violation of which rules was liable to imperil the personal safety of his fellow-servants, he was ⁴⁹⁰ incompetent. And if the master was negligent in employing or retaining him, a resulting injury to a coemployé, by such incompetent servant disobeying such rules, or neglecting to do properly some act required of him as fireman, would equally relate to the master's negligence as the proximate cause. So the instructions referred to were properly refused.

It is assigned as error that the court instructed the jury regarding the first question as follows: "An employer is bound to furnish competent employés; if he fails to do so he is liable for injuries caused by their incompetency, unless the coemployé assumes the risk." That, in effect, told the jury that a failure to furnish competent employés renders the employer liable, without regard to whether such failure is the result of a want of ordinary care or not. Such is not the law, and we apprehend the learned circuit judge did not intend to be so understood, but it is hard to perceive how the jury could have otherwise understood the language used. The rule is, that the master must use ordinary care and diligence in respect to employing competent servants, having regard always to the character of the particular service and the consequences that may probably result from incompetency in such service. When such care and diligence shall have been exercised, and a servant is nevertheless employed who is incompetent, a resulting injury to a fellow-servant cannot legally be chargeable to the master upon the ground of neglect of duty to such injured servant: 7 Am. & Eng. Ency. of Law, 844, and cases cited.

It is further assigned as error that the court refused to set aside the verdict as against the weight of evidence. This court

cannot decide whether the trial court held right or wrong on that, as an original proposition. For sufficient reasons, the duty of preventing injustice through a wrong verdict is vested primarily in the trial court. From its decision, right or wrong, there is no relief under our system of jurisprudence, unless such decision be made to appear by the ⁴⁹¹ record so manifestly wrong as to amount to a clear abuse of judicial discretion, and that occurs ordinarily only where there is practically no proper evidence which, if believed, will support the verdict. From the fact that where there is a wrong verdict on the evidence, and yet there is evidence which, standing alone, may reasonably be believed to support it, there is no relief on appeal, trial courts should, with deliberation and care, exercise the broad legal discretion with which they are clothed, so as to promote, so far as practicable, the due administration of justice. Here, as appears by the record, several important allegations with little or no evidence to support them except that of the plaintiff himself, were found in his favor by the jury, notwithstanding the evidence of several witnesses, some of whom at least were disinterested so far as the record shows, and very strong probabilities growing out of the situation, to the contrary. Yet the decision of the court on the motion to set aside the verdict is to the effect that it is not against the clear preponderance of the evidence, and inasmuch as we cannot say that the plaintiff's evidence is impeached by all the other evidence, and all the reasonable probabilities, so as to bring the case within *Badger v. Janesville Cotton Mills*, 95 Wis. 599, and *Vorbrich v. Geuder etc. Mfg. Co.*, 96 Wis. 277, the decision must be sustained on this appeal. The case is within *O'Brien v. Chicago etc. Ry. Co.*, 92 Wis. 340, and within the general principle that the action of the trial court, in refusing to set aside a verdict as against the evidence, will not be disturbed if there is any evidence to support it: *Weatherby v. Meiklejohn*, 61 Wis. 67; *Van Doran v. Armstrong*, 28 Wis. 236; *Hutchinson v. Chicago etc. Ry. Co.*, 41 Wis. 541; *Seymour v. Seymour*, 64 Wis. 16; *Hickey v. Chicago etc. Ry. Co.*, 64 Wis. 649; *Austin v. Chicago etc. Ry. Co.*, 93 Wis. 496.

By the Court. The judgment of the circuit court is reversed, and the cause remanded for a new trial.

MASTER AND SERVANT—PROMISE OF MASTER TO REMEDY DEFECTS—EFFECT OF SERVANT'S CONTINUING IN SERVICE.—If a servant discovers that the service has become more dangerous than he had anticipated and so notifies the master, he has a right to rely, for a reasonable time, upon the promise of

the master that the defect will be repaired. If, however, the master does not repair the defect within a reasonable time, and the servant has full knowledge thereof and of the consequent danger, it is his duty to quit the service if he does not intend to take the risk, and if thereafter injured thereby he cannot recover therefor from his master: *Illinois Steel Co. v. Mann*, 170 Ill. 200; 62 Am. St. Rep. 370, and note; *Erdman v. Illinois Steel Co.*, 95 Wis. 6; 60 Am. St. Rep. 66, and note. A servant may be guilty of contributory negligence by remaining in service after he has discovered the negligence and incompetence of a fellow-servant: *Western Stone Co. v. Whalen*, 151 Ill. 472; 42 Am. St. Rep. 244, and note. It is his duty to notify his master of his discovery, but, having done so, he may ordinarily rely upon the master's promise to remedy, and remain in his employment: *Extended note to Porter v. Western etc. R. R. Co.*, 2 Am. St. Rep. 279, 280; monographic note to *Murray v. S. O. R. R. Co.*, 36 Am. Dec. 286, 287.

MASTER AND SERVANT—INCOMPETENT FELLOW-SERVANTS—LIABILITY OF MASTER.—A master is not liable to his servant for injuries resulting from the negligence of a fellow-servant, unless the latter was incompetent and unfit for the service, and this was known or should have been known, to the master: *Park v. New York Cent. R. R. Co.*, 155 N. Y. 215; 63 Am. St. Rep. 663, and note. See *Handley v. Daly Min. Co.*, 15 Utah, 189; 62 Am. St. Rep. 916, and note.

NEGLECT—LIABILITY FOR—WHEN EXISTS.—Negligence is the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or the doing of something which a prudent and reasonable man would not do. A cause of action for negligence is not made out without proving that the negligence charged was the proximate cause of the injury: *Brotherton v. Manhattan Beach Imp. Co.*, 48 Neb. 568; 58 Am. St. Rep. 709, and note.

CASES
IN THE
SUPREME COURT
OF
CALIFORNIA.

FOLEY v. FOLEY.

[120 CALIFORNIA, 33.]

PRACTICE.—A MOTION FOR A NEW TRIAL IS NOT an appropriate proceeding to review the action of a court in taking judgment when there has been no trial upon an issue of fact, as where the answer of the defendant has been struck out, and judgment entered against him as for want of an answer.

PRACTICE.—ISSUES OF FACT DO NOT EXIST IN A SUIT FOR A DIVORCE when there has been no answer, though the code provides that no divorce can be entered upon the default of the defendant, but the court must, in all cases, require proof of the facts alleged before granting relief. Such an issue arises only when a material averment of fact is made by one party and controverted by another.

APPELLATE PROCEDURE.—A BILL OF EXCEPTIONS settled for one purpose may be used for another. Hence, though it was presented and settled for the purpose of being used on a motion to vacate a judgment, it constitutes a part of the record on appeal from such judgment, and may require its reversal, if thereby error, prejudicial to the appellant, is disclosed.

CONTEMPT—SERVICE OF ORDER ISSUED IN PROCEEDINGS FOR, WHEN NEED NOT BE PERSONAL.—If it appears that a litigant against whom an order to show cause why he should not be punished for a contempt of court has been issued is concealing himself to avoid compliance with the orders of the court and the service of its process, the court may direct that the order to show cause may be served on his attorneys of record.

CONSTITUTIONAL LAW, STRIKING OUT ANSWER OF PERSON IN CONTEMPT.—A contempt of court, whether in refusing to subscribe a deposition or in any other matter, cannot justify the striking out of the answer of the defendant and the taking of judgment against him as by default. The contempt must be punished in some other mode. Whether in contempt or not, every citizen has the right, of which no court can deprive him, to be heard before being deprived of property or personal rights. To

strike out his answer amounts to taking his property without due process of law.

PRACTICE.—THE RELIEF WHICH CAN BE GRANTED UPON A JUDGMENT BY DEFAULT cannot exceed that demanded in the complaint. Hence, if the complaint prays that the defendant be restrained from transferring certain property, it is error, in a decree entered upon default, to provide that the defendant transfer such property to a receiver.

George H. Perry and Fisher Ames, for the appellants.

Sullivan & Sullivan, for the respondent.

33 VAN FLEET, J. Action for divorce, in which the corporation is joined as a party defendant to protect plaintiff's rights in certain property alleged to have been conveyed to said corporation by the defendant, Daniel H. Foley, in fraud of and to defeat plaintiff's rights therein.

The corporation made default, but subsequently moved that the default be vacated and it be allowed to answer, which motion was denied.

The defendant Foley interposed a demurrer to the complaint; but the court, on motion of plaintiff, struck out his demurrer and gave judgment against him as by default for his failure to pay certain alimony ordered by the court, and for neglect and refusal to subscribe his deposition taken in the action.

Both defendants interposed motions for a new trial, but their motions were denied. Six appeals in all were taken by the defendants: an appeal by the corporation from the order denying its motion to set aside its default; an appeal by defendant Foley from the order striking out his demurrer and ordering judgment to be entered against him; a separate appeal by each of the defendants from the order denying his motion for a new trial; and, lastly, a separate appeal by each of the defendants from the judgment. The two first-mentioned appeals were heretofore dismissed by this court upon the ground that the orders from which they were attempted to be prosecuted were not appealable.

1. As to the appeals from the orders denying the motions of defendants for a new trial, they cannot be entertained. A motion for a new trial is not an appropriate proceeding to review the action of the court in giving judgment in a case where there has been no trial upon issues of fact: *Hayne on New Trial and Appeal*, sec. 443; *Savings etc. Soc. v. Meeks*, 66 Cal. 371; *Gregory v. Gregory*, 102 Cal. 50; *In re Heldt*, 98 Cal. 553.

In this case there was no such trial, the judgment being by de-

fault against both defendants. That is, while defendant Foley²⁷ did not technically make default, there was no answer by either defendant controverting any fact, and the judgment against both was without a trial upon issues of fact. In such a case there is no office to be subserved by a new trial. A new trial is "a re-examination of an issue of fact": Code Civ. Proc., sec. 656; and, unless such an issue has been raised and tried, there is nothing which can be reviewed by this method.

While appellants concede this to be the law in actions other than for divorce, they contend that in the latter class of cases there is always of necessity a trial of issues of fact; that the law raises such issues whether the defendant answers or not. But this is a misapprehension of the effect of the statute. The code does provide that no divorce can be granted upon the mere default of the defendant, but that the court shall in all cases "require proof of the facts alleged" before granting the relief: Civ. Code, sec. 130. But the effect of that provision is not to raise "issues of fact," nor to constitute the taking of proof submitted by the plaintiff in cases where the defendant has not answered a "trial," as those terms are used in the provisions relating to new trials. Such an issue arises only where a material averment of fact is made on the one side and is controverted upon the other: Code Civ. Proc., secs. 588, 590; and the "re-examination" provided for in section 656 is where there has been a trial of such an issue.

The provision of the Civil Code merely declares the policy of the law to be that in divorce cases, whether the defendant suffer default or not, the relief shall not be granted until the facts upon which it is sought are established by proof. In such an instance, however, as in any other where the defendant makes default and suffers judgment upon a mere ex parte showing, his remedy in seeking relief from the judgment is under section 473 of the Code of Civil Procedure, and not by motion for a new trial: Hayne on New Trial and Appeal, sec. 9, and cases above cited.

The attempted proceedings for a new trial were, therefore, wholly nugatory and cannot be reviewed.

2. Upon their appeals from the judgment a number of questions are raised by appellants.

²⁸ (1.) It is contended by the corporation defendant that the court below erred in denying its motion to vacate the default entered against it. Respondent objects in limine that there is no record upon which this question can be reviewed. In support

of its attempted appeal from the order defendant had settled a bill of exceptions embodying the proceedings had on said motion, and it now relies upon said bill of exceptions as a basis on which to review said order on this appeal from the judgment. Respondent's contention is, that said bill, having been settled only as a bill of exceptions on appeal from the order, is not properly a part of the record on appeal from the judgment, and cannot be referred to for such purpose; that the only record properly before us is the judgment-roll of which that bill of exceptions is not a part under section 670 of the Code of Civil Procedure. But, while section 670 prescribes what comprises the judgment-roll, it does not prescribe what shall constitute the record on appeal in such a case. Section 649 of said code provides: "A bill containing the exception to any decision may be presented to the court or judge for settlement at the time the decision is made, and, after having been settled, shall be signed by the judge and filed with the clerk," et cetera; and section 950 of said code provides: "On an appeal from a final judgment the appellant must furnish the court with a copy of the notice of appeal, of the judgment-roll, and of any bill of exceptions or statement in the case upon which the appellant relies." The mere fact, therefore, that the bill was technically presented for settlement and use on an appeal from the order, from which no direct appeal lies, cannot preclude its use for the purpose of reviewing such order on the appeal from the judgment.

But an examination of the bill of exceptions does not disclose error in the action of the trial court in refusing to set aside the default. The only ground upon which the corporation based its motion was that it had not been served with summons in the action, and upon this question the evidence was not only squarely conflicting, but in our judgment preponderated against its contention. In such a case we cannot disturb the order, there being nothing to indicate an abuse of discretion in denying the relief.

20 (2.) The defendant, Daniel H. Foley, also asks to have reviewed on the appeal from the judgment the order striking out his demurrer and directing judgment against him, he having preserved an exception to such order, in a bill of exceptions found in the transcript. Respondent makes a like objection to the consideration of this bill of exceptions as that urged against the one just considered; but, for the reasons stated, the objection is not tenable.

It is first objected by this appellant that the action of the

court was unauthorized because, the proceeding being one to bring him into contempt, no valid service of the order to show cause was made upon him, in that it was not served personally. The affidavits upon which the order to show cause was based disclose that Foley was concealing himself to avoid a compliance with the orders of the court and the service of its process, and the court upon that showing directed that the order be served upon his attorneys of record, which was done. This method of procedure was, under the circumstances, authorized and constituted a valid service: *Golden Gate etc. Co. v. Superior Court*, 65 Cal. 187; *Eureka Lake Co. v. Superior Court*, 66 Cal. 311. Moreover, it appears that Foley appeared by his counsel in answer to the order to show cause, and submitted evidence upon the merits of the application, and resisted the same without objection to the want of personal service. This, of itself, was sufficient to give the court jurisdiction over him: *Keisker v. Ayres*, 46 Cal. 82. It was not necessary that he be personally present; nor could he have been required to be so: *Ex parte Gordon*, 92 Cal. 478; 27 Am. St. Rep. 154.

It is mainly objected, however, that the court had no authority to strike out its demurrer, refuse to permit him to answer, and render judgment against him pro confesso for his failure to obey its order for alimony; that a disobedience of that order constituted a contempt for which the only punishment it was competent to impose under the code was fine and imprisonment; and, further, that in an action for divorce the court could not thus deprive defendant of his right to make a defense. Both of these propositions find support in the previous decisions of this court: *Galland v. Galland*, 44 Cal. 475; 13 Am. Rep. 167; *Johnson v. Superior Court*, 63 Cal. 578.

⁴⁰ Respondent contends in effect that these cases are in conflict with the weight of authority; that the power of a court of equity to strike out the answer of a recalcitrant defendant, and deny him an opportunity to be heard for his contempt in neglecting or refusing to render obedience to its lawful orders, is one which has always been indulged independently of statute; that it adheres in the very nature of the jurisdiction and functions vested in that court, and should not be deemed affected by general statutory provisions regulating the punishment for contempts. And some of the cases cited by counsel—particularly those from New York—certainly go to this extent. But, independently of the effect of our statute, we are satisfied that these cases would clothe that court with an extent of power which it

has never rightfully possessed. While the general remedial power of a court of equity to take all proper measures to coerce respect and obedience to its lawful orders has always been recognized, to the extent that a party in default may justly be denied the right to have any affirmative action of the court sought by him until he shall have purged himself of his contempt, that power has never extended to a point that would authorize a denial to a party of the right to be heard in defense to any affirmative judgment proposed to be taken against him whereby he would be deprived of any substantive right of person or property. The supreme court of the United States, in the most recent case upon the subject which has fallen under our observation—that of *Hovey v. Elliott*, 167 U. S. 409—after a most exhaustive and thorough consideration of the question, and upon a review of all the leading cases in England and the courts of this country where such power has been invoked, including those relied upon by respondent, comes unhesitatingly to the conclusion that this coercive power has never existed in those courts to the extent here claimed; and it is there expressly declared that even in a court possessing plenary power to punish for contempt, untrammelled by statute, the power does not exist, and never has, to summon a defendant to answer, and after obtaining jurisdiction refuse to allow him to answer, or strike his answer from the files and condemn him without a hearing, on the theory that he has been guilty of a contempt of the court. And this is put upon the broad, fundamental ground ⁴¹ that such action is violative of a constitutional right of the citizen to be heard before being deprived of his property or personal rights, and would amount in effect to a taking of his property without due process of law, since that term, if it means anything, signifies a right to be heard in one's defense. "If," say that court, "the power to violate the fundamental constitutional safeguards securing property exists, if they may be with impunity set aside by courts on the theory that they do not apply to proceedings in contempt, why will they not also apply to proceedings against the liberty of the subject? Why should not a court in a criminal proceeding deny to the accused all right to be heard, on the theory that he is in contempt, and sentence him to the full penalty of the law? No distinction between the two cases can be pointed out. The one would be as flagrant a violation of the rights of the citizen as the other. The one, as pointedly as the other, would convert the judicial department of the government into an

engine of oppression, and would make it destroy great constitutional safeguards.”

And, speaking of the oft-repeated assertion that from the earliest times the court of chancery in England has possessed and exercised such power, it is said: “But this contention is without solid foundation to rest upon, and is based upon a too strict and literal rendering of general language to be found in isolated passages contained in the works of writers on ancient law and practice, and on loose statements as to the practice of the court of chancery to be found in a few decisions of English courts. Certain it is that in all the reported decisions of the chancery courts of England no single case can be found where a court of chancery ever ordered an answer to be stricken from the files and denied to a party defendant all right of hearing because of a supposed contempt. And the American adjudications, whilst there are two cases, one in New York and the other in Arkansas, asserting the existence of such power, an analysis of these cases and the authorities upon which they rely will conclusively show the erroneous character of the conclusions reached.”

That case is controlling as authority here, not alone because of the high character of the court rendering the opinion, but because the principles there announced are conclusive upon us ^{as} in this case. As the right of the defendant, which it is thus manifest was violated by the court below, is one for the protection of which the party may always have resort, if need be, to the supreme court of the United States, its declaration of the law is as binding upon this court as a mandate of the constitution.

But it is urged that, aside from the question of the inherent power of the court, section 1991 of the Code of Civil Procedure expressly authorized the action of the court because of the defendant's refusal to subscribe his deposition. In response to this, appellant contends that the evidence did not warrant the court in holding that he was guilty of such refusal. As to this fact, however, we need not inquire, for it is obvious that, if that section were intended to authorize the action here taken, it is to that extent obnoxious to the principles stated in *Hovey v. Elliott*, 167 U. S. 409. Where a given act amounts to the invasion of a constitutional right, we can perceive no well-founded distinction in principle whether such invasion come from an attempted legislative sanction, or from the naked, unauthorized act

of the court. The one is as ineffectual as the other. Moreover, under the doctrine of *Johnson v. Superior Court*, 63 Cal. 578, the remedy provided by the last clause of that section is not applicable to an action for divorce.

It is further said that striking out defendant's demurrer was in effect merely overruling it; and, as it is contended that the demurrer was properly overruled, it is urged that the court was authorized to order judgment without giving defendant leave to answer. But if this were the legal effect of the action taken, which we are not prepared to concede, we should have no hesitation in holding that a refusal of the right to answer under such circumstances, especially in an action for divorce, would amount to an abuse of discretion for which the judgment would be reversed: *Johnson v. Superior Court*, 63 Cal. 578.

Since these considerations require the judgment to be reversed as to this appellant, it is unnecessary to consider the further objections thereto made by him.

3. The only other point requiring notice is that of the defendant corporation that the relief granted against it by the judgment is in excess of that demanded in the complaint, and ⁴³ that the judgment is therefore erroneous under section 580 of the Code of Civil Procedure, which provides that the relief granted to the plaintiff, if there be no answer, cannot exceed that demanded in the complaint. This objection must be sustained. The only relief asked against this defendant is, that it "be enjoined from disposing of the real property or mortgages hereinabove set forth, or any of said property conveyed by said Daniel H. Foley to said corporation, and that said alleged corporation be enjoined from allowing or permitting the transfer of any shares of the capital stock of said corporation belonging to said Daniel H. Foley." The judgment directs as to this defendant, "That said Diamond Real Estate and Investment Company be and it is hereby restrained and enjoined from disposing of the real property hereinabove described, or any part thereof, and from disposing of any of said mortgages hereinabove described, and that it be and it is further restrained and enjoined from a transfer of the shares of the capital stock of said corporation belonging to said defendant, Daniel H. Foley"; and "that said defendants transfer and convey to said receiver of all the property hereinabove described, and that said receiver take possession of all of said property and hold the same subject to the order of this court." The direction that the property be conveyed to the

receiver is clearly in excess of the relief asked, and, consequently, under the above section more than the court was authorized to award: *Brooks v. Forington*, 117 Cal. 219.

For these reasons the judgment is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Harrison, J., and Garoutte, J., concurred.

Hearing in Bank denied.

CONTEMPT OF COURT—ORDER TO SHOW CAUSE—SENTENCE.—When a proceeding for contempt is by order to show cause, copies of the order, affidavit, or other legal evidence used must be served upon the accused or his solicitor such a length of time prior to the hearing as the court in the order shall direct: *People v. Wilson*, 64 Ill. 195; 16 Am. Rep. 528. Punishment for contempt of court cannot be broken up into portions. The judgment inflicting it must be entire and final for the particular contempt. So the payment of counsel fees cannot be imposed as such punishment: *O'Rourke v. Cleveland*, 49 N. J. Eq. 577; 31 Am. St. Rep. 719, and note.

JUDGMENT—VOID FOR WANT OF JURISDICTION.—A judgment or decree outside of the issues is, to that extent, without jurisdiction and void: *Metcalf v. Hart*, 3 Wyo. 513; 31 Am. St. Rep. 122, and note.

SAN FRANCISCO v. GROTE.

[120 CALIFORNIA, 59.]

EJECTMENT MAY BE MAINTAINED BY A MUNICIPAL CORPORATION to recover possession of a street dedicated to a public use, whether it or the adjacent proprietor owns the fee.

HOMESTEAD.—The dedication as a public street of lands which are subject to a homestead cannot, as against a wife, result from the acts or agreement of her husband.

STREETS.—THE DEDICATION OF LAND AS A PUBLIC STREET is not established by proof that for a period of eight years, without either assent or objection on the part of the owner, it was used by the public generally for travel.

T. Z. Blakeman, for the appellant.

Harry T. Creswell, city and county attorney, for the respondent.

●● **GAROUTTE, J.** This action is brought by the city to recover the possession of a small tract of land twelve and one-half by thirty-five feet, being a strip, of the aforesaid dimensions, forming the rear end of the lot of defendant. It is claimed by the city and found as a fact by the trial court that such strip had been dedicated by the owner to the public as a highway or street.

Two material questions are raised by this appeal: 1. Can the city and county of San Francisco maintain ejectment for the recovery of the possession of a public street, without showing ownership of the land in fee? 2. Does the evidence show a dedication of the strip of land in dispute to the use of the public for street purposes?

While there may be a difference of opinion existing in the courts of other states upon the question, we think the doctrine should be held settled in this state that ejectment can be maintained for the recovery of the possession of a street dedicated to the public use by the owner of the fee. In *Visalia v. Jacob*, 65 Cal. 434, 52 Am. Rep. 303, this court declared: "It is true an action of ejectment may be maintained by a municipal corporation for the recovery of the possession of a street wrongfully possessed by an individual, whether the corporation owns the fee, or the adjoining proprietor retains it. In the latter case, the right of the municipality to regulate the public use, and for that purpose to possess, use, and control the property, is treated by the courts as a legal and not merely an equitable right." The same doctrine is reiterated in extenso in *Southern Pac. Co. v. Burr*, 86 Cal. 283. Although the facts there presented were somewhat different, the principle of law involved was the same, and the case is direct authority upon the legal issue here raised. In *Eureka v. Armstrong*, 83 Cal. 623, ejectment was successfully maintained to secure the possession of streets dedicated to the use of the public by the owner in fee, opposing counsel not even raising the objection that the remedy pursued was not authorized by the law. The same conditions are presented in *Eureka v. Fay*, ⁶¹ 107 Cal. 166. In *Napa v. Howland*, 87 Cal. 84, the right of recovery in ejectment was sustained, and a rehearing was denied, although at all stages of the litigation it was insisted by defendant that the proper remedy for plaintiff was not ejectment. *Dillon on Municipal Corporations*, third edition, section 662, and *Elliott on Roads and Streets*, pages 321, 322, fully support the doctrine of the California cases we have cited. *Wood v. Truckee Turnpike Co.*, 24 Cal. 487, is not in point, and especially is this true after the limitations and construction placed upon it by the decision in *Southern Pac. Co. v. Burr*, 86 Cal. 283. It may be conceded that a naked right of way, an easement in its simplest form, a mere right to pass over the land of another, is a thing so intangible and unsubstantial as to be insufficient to support an action of ejectment. But here the right of the city goes far beyond that. The city has the right

of exclusive possession, a right to disturb the soil, a right to grade and otherwise improve the street in many ways. In other words, more than a mere right to the use of a street passes to the public by dedication; in addition to the right of use there passes such an interest in the land as is necessary for the enjoyment of that use by the public.

In 1871, when the title to this land passed from the city to defendant's husband, he placed a homestead upon the lot. The defendant was at that time his wife. Grote died in the year 1889. During this period of eighteen years he did and said various things indicating to some extent an intention upon his part to dedicate the tract of land in dispute to the public for street purposes. But during all this period the declaration of homestead rested upon the premises, and under such circumstances the wife at all these times had an interest in the realty which the husband could not take away from her by any act of dedication upon his part. By reason of the prohibition declared by section 1242 of the Civil Code, the husband could neither convey nor encumber this land. It may at least be said that, if a dedication by the husband was established, an encumbrance thereafter rested upon the land. Indeed, if the city, by acts of dedication upon the part of the husband, can be vested with an interest in the realty so substantial as to support an action in ejectment, and the court so holds, then we have no doubt that such interest is so substantial as to form a burden upon the wife's rights, which are extended ⁶² to her by the aforesaid section of the code. For these reasons there was no dedication of this land for a public use prior to the husband's death, for it was not in his power to dedicate, however clear his intention so to do may appear.

It is further claimed that a dedication occurred as evidenced by the acts of the wife subsequent to the death of the husband. We fail to find any evidence justifying such a conclusion. It is not a trivial thing to take another's land, and for this reason the courts will not lightly declare a dedication to public use. It is elementary law that an intention to dedicate upon the part of the owner must be plainly manifest. Here there is no such manifest intention. No single act of the defendant can be pointed out so indicating. For a period of about eight years, without either consent or objection upon her part, the land was used by the public generally for travel, and this was all. During his lifetime the husband erected a tenement upon the rear of the lot fronting upon the strip of land in dispute, the steps occupying four feet thereof. This house remained in the same position during

the ownership and possession of the defendant; but there is nothing in these facts indicating dedication upon her part.

For the foregoing reasons, the judgment is reversed and the cause remanded.

Van Fleet, J., and Harrison, J., concurred.

MUNICIPAL CORPORATIONS — EJECTMENT—POSSESSION OF STREET.—A city cannot maintain ejectment for a street the fee of which it does not own: *Racine v. Crotsenberg*, 61 Wis. 481; 50 Am. Rep. 149. A county cannot maintain ejectment to remove obstructions from land dedicated as a street but held adversely: *Bay County v. Bradley*, 39 Mich. 163; 33 Am. Rep. 367. For holdings in accord with the principal case, see note to *Tennessee etc. R. R. Co. v. East Ala. Ry. Co.*, 51 Am. Rep. 478.

HOMESTEAD—RIGHTS OF WIFE.—No interest, encumbrance, or lien not mentioned in the organic law can attach to or affect a homestead, unless given by the joint consent of the husband and wife: *Pilcher v. Atchison etc. R. R. Co.*, 38 Kan. 516; 5 Am. St. Rep. 770, and note.

DEDICATION IMPLIED FROM USER.—In some jurisdictions, a dedication, or intent to dedicate, cannot be presumed or inferred from mere user of a street or highway; but in others the existence of a street or highway may be proved by the presumption arising from long uninterrupted use and enjoyment. See monographic note to *Whitesides v. Green*, 57 Am. St. Rep. 751, 752, on highways by user.

PACIFIC ROLLING MILL COMPANY v. BEAR VALLEY IRRIGATION COMPANY.

[120 CALIFORNIA, 94.]

MECHANIC'S LIEN—ENFORCING AGAINST PART OF A SYSTEM FOR SUPPLYING AND DISTRIBUTING WATER.—If a canal is projected in sections, two only of which are completed, and, when so completed, a pre-existing pipe line is used in connection therewith, and the owner has a pre-existing system of reservoirs and ditches, all intended to collect, store, and supply water for irrigation, one who has contracted to supply materials or perform work upon one of the sections of such canal may claim and enforce a lien thereon without including the contemplated parts of the canal which have not been constructed, or the pipe line, or such other property of the owner forming part of the general system, but existing before, and capable of being used independently of, the canal.

APPELLATE PROCEDURE — HARMLESS ERROR.—If a court refuses to permit the defendant to amend his answer, but nevertheless receives evidence upon all the issues tendered by the proposed amendment and gives such evidence full consideration, no injury can have resulted from such refusal.

William J. Hunsaker, for the appellants.

Sheldon Borden and Wilson & Bulle, for the respondent.

⁹⁴ **CHIPMAN, C.** The defendant, Bear Valley Irrigation Company, was incorporated under the laws of this state for the purpose of engaging in very many kinds of business. Among other of its undertakings was that of constructing a canal or aqueduct, ⁹⁵ called "Santa Ana canal," from a point on the Santa Ana river, known as the company's head works, through what is called Blair's Pass, to the Alessandro & Perris Irrigation districts, in Riverside county. The entire proposed line of canal comprised what are termed in the transcript divisions 1, 2, 3, and 4. The work of construction began about December, 1892; divisions 1 and 2 were completed September 16, 1893, when construction work ceased; division 3 was partly graded; division 4 was only surveyed. The route of the canal was down the Santa Ana river for about three miles, where it left that stream and crossed the dividing water shed to Mill creek, where at the head of what is called the Alessandro pipe line of the company, previously constructed and in operation, divisions 1 and 2 ended. Division 3 was to follow substantially the route already taken by the Alessandro pipe line into Blair's Pass. Below this point the line was called division 4. Plaintiff and plaintiff's assignors furnished materials used in the construction of divisions 1 and 2. This action was brought to foreclose plaintiff's liens. The complaint and liens were so drawn as to claim a lien on divisions 1, 2, and 3, or on 1 and 2, as the facts might warrant, but did not include the Alessandro pipe line or other of the company's works. Plaintiff had judgment foreclosing its liens on divisions 1 and 2. After the action was brought, J. A. Graves and A. P. Maginnis, who had been appointed receivers of defendant company by order of the United States circuit court, and to whom, as such receivers, the defendant company had transferred all its property, answered the complaint and now prosecute this appeal, by bill of exceptions, from the judgment and from the order denying motion for a new trial.

1. Appellants challenge the sufficiency of the evidence to justify findings 5, 10, 13, and 15, which are to the effect, briefly stated, that divisions 1 and 2 of the "Santa Ana Canal" form a complete structure within the meaning of section 1183 of the Code of Civil Procedure, and do not and never did form a part of an entire and continuous line or system of canals, and that the said canal does not extend beyond the head of the Alessandro pipe line.

As I understand the position of appellants, it is that the lien ⁹⁶ should have been claimed upon the entire system of defend-

ant company, or should at least have included division 3 and the Alessandro pipe line; that "the word 'structure,' as used in section 1183 of the statute, means an entire thing; that the statute makes no distinction between buildings, railroads, ditches, flumes, aqueducts, mining claims, or other structures; therefore, a ditch or flume which forms a part of a continuous line of canal, owned and operated by one person or company, is as much an entirety as a railroad, and the law with reference to mechanics' liens on railroads is clearly applicable to such cases." *Cox v. Western Pac. R. R. Co.*, 44 Cal. 28, where a lien was filed on a portion of a railroad, and *Williams v. Mountaineer etc. Co.*, 102 Cal. 134, where the lien was claimed on a portion of the property comprising a mill, tramway, boarding-house, and other buildings, belonging to a mining claim, are relied upon by appellants. Appellants also cite *Brooks v. Railway Co.*, 101 U. S. 443; *Farmer's etc. Co. v. Candler*, 87 Ga. 241; *National etc. Works v. Oconto etc. Co.*, 52 Fed. Rep. 43; affirmed, 59 Fed Rep. 19; *Midland Ry. Co. v. Wilcox*, 122 Ind. 84; *Helm v. Chapman*, 66 Cal. 291; *Willamette etc. Co. v. Kremer*, 94 Cal. 205; *Wright v. Cowie*, 5 Wash. 341; *Knapp v. St. Louis etc. Ry. Co.*, 74 Mo. 374. No intelligent application of the cases cited can be made without a clear understanding of the facts. William Ham Hall testified: "I planned the Santa Ana canal; the objective point of that canal was the Alessandro tunnel, which is from twelve to twenty miles from the head of the Alessandro pipe line, depending on the route which might be followed. Divisions 1 and 2 were planned so as to go to Mill creek, near the head of the pipe line. Division 3 ran thence to Blair's Pass, almost parallel to the pipe line." Again he testified: "It was realized from the beginning that water would have to be turned into that pipe as a temporary expedient; the canal was not regarded as a mere feeder to the pipe, but the canal was projected to be built through to the tunnel. If the canal had been constructed through to the tunnel the pipe line had no utility." Again: "The intention was to take up the Alessandro pipe line from its head to Blair's Pass, seeing that it ran parallel to the canal for that length and would be of no use; . . . or perhaps use a small piece of it in the neighborhood of Blair's Pass by connecting ⁹⁷ with the canal there." On cross-examination, he was asked: "Q. Wasn't it the intention from the beginning that when the Santa Ana canal was constructed to the Alessandro pipe line to connect the two together? A. No, sir, it was not. From the beginning it was not intended to put the Santa Ana

canal there at all." It appeared that the canal had a capacity of six thousand miner's inches, while the pipe could carry only nine hundred to one thousand miner's inches. A witness for appellants testified that this pipe line was finished about May or June, 1891, and took water from Mill creek from that time until September, 1893. Appellants introduced certain proceedings of defendant company in relation to acquiring temporarily, from certain persons, the right to take water from Mill creek to run in this pipe, but there is nothing in this evidence inconsistent with the testimony of Mr. Hall that the pipe line was used only as "a temporary expedient," and in fact formed no part of the system of which the Santa Ana canal was, what this witness termed, "the main artery."

The defendant company owned what is known as Bear Valley reservoir for the storage of water, several miles above the "head works." Bear creek empties into Santa Ana river about four miles above the head of the canal. Water is taken directly from Santa Ana river into the canal, and at some seasons of the year part of the water comes from this storage reservoir. The company also takes water from Santa Ana river for ditches and flumes other than and wholly independent of the canal.

Division 3 was never completed. Mr. Hall testified: "It has never been a completed canal. It has never been in condition to be used as a canal. It has never been graded for its entire length. The reason why it was not graded was that the company did not have the right of way; at places there are flumes yet to be built; from half a dozen to eight pieces of flume to be built, aggregating between three and four thousand feet. There were tunnels yet to be constructed—at least six—I don't remember the exact number." On cross-examination he said: "One place that I know of my own knowledge where the company did not have a right of way was through a tract owned by a man named McIntosh, and the distance was nearly three-quarters ⁹⁸ of a mile by the located line. . . . I know, up to within thirty days before work was stopped, they did not have a right of way in several places that I could designate." It appeared that the company let the work by separate contracts on each of the divisions, and it was not done under an entire contract for the whole work. Keeping the facts before our minds, there is not much to be said as to the law which has not already been settled. *Williams v. Mountaineer etc. Co.*, 102 Cal. 134, very clearly points out a distinction between the

lien upon a "mining claim" and the lien upon "other structures," as mentioned in the act. In the case of *Cox v. Western Pac. R. R. Co.*, 44 Cal. 28, the contract let to McLaughlin was an entire contract for the whole work of grading the roadbed, constructing all superstructures, buildings, et cetera, to place the road in complete working order to receive the rails from San Jose to Stockton. McLaughlin sublet a portion of the work for the whole distance to Cox & Co., upon an entire contract to be paid for as sections of twenty miles were completed. Upon McLaughlin's failure to pay upon the completion of the first section, Cox & Co. filed a lien upon that part of the road. It was held that neither the contractor nor a subcontractor can, from time to time as the work progresses, file successive liens, and that but one lien can be acquired, and it must be filed within the time specified in the statute after the completion of the work and upon the completed road.

Importance is attached to the fact that the contracts were entire for the whole work and plaintiffs had not fully performed; and, besides, there was nothing to show an abandonment of or interruption in the work; the complaint failed to allege that performance had been prevented by McLaughlin or either of the defendants, or that the contract had been rescinded. Here, then, the structure contemplated was a completed roadbed ready for the rails, extending from San Jose to Stockton. Under the facts shown, the lien could not attach to a portion of the road, and the court said: "It would render the statute absurd to hold that one contractor or subcontractor could acquire a lien upon a bridge, another upon a tunnel, and a third upon a culvert, all of which constitute portions of a railroad." The contention of appellants would require a lien for erecting a depot building to ^{or} replace one destroyed by fire, or a bridge washed away by flood and belonging to a company operating a railroad already completed and in operation, to claim a lien upon the entire system, however extensive, of which the depot or bridge formed a part. But we do not think this is the correct meaning of the statute. (*Hill v. La Crosse etc. R. R. Co.*, 11 Wis. 214, where a lien was upheld upon a railroad depot building and the lot on which it stood; *Purtell v. Chicago etc. Bolt Co.*, 74 Wis. 132, where a lien upon a railroad bridge was held good.) So far as any principle found in *Midland Ry. Co. v. Wilcox*, 122 Ind. 84, may have any analogy to the principle involved here, that case seems to me unfavorable to appellants' contention. The railway company owned the line from Anderson to Lebanon,

only a portion of which (Anderson to Noblesville) was completed and in operation; from Noblesville to Lebanon it was incomplete and was under construction. For the work on this latter section the lien was filed, and on this section alone. The lien was sustained on the uncompleted portion of the road. Of the cases dealing with waterworks, gasworks, and the like, that of *National etc. Works v. Oconto Water Co.*, 52 Fed. Rep. 43, 59 Fed. Rep. 19, is a fair illustration. The lien claimant had furnished the pipe for the water system of the city of Oconto, which had been laid in the streets and connected with the pumping works and well of defendant. This and like cases are examples of continuous and contemporaneous works, and are also examples where, of the works comprising the "structure," each is useless without the other, or where they are so interdependent and intimately related that they must be regarded as an entirety.

Here, however, the Bear Valley reservoir had been in use long before the Santa Ana canal was projected, and so also had the Alessandro pipe line. The division 3 of the projected canal was graded in disconnected parts, but there remained yet to be obtained rights of way without which completion was impossible, and finally work on this division was abandoned and the whole property passed into the hands of receivers, and no work has been done on this division since September, 1893, so far as we know. We find no case among those cited by appellants parallel in its facts with the case before us, and no principle upon which their view of the matter can be upheld.

¹⁰⁰ Respondent relies upon *South Fork Canal Co. v. Gordon*, 6 Wall. 561, as conclusive against appellants' contention that the lien should extend over the Alessandro pipe line. Just why appellants should insist that respondents are entitled to no lien at all because they have asked it on too little of appellants' property might challenge inquiry. But aside from this we think the facts here bring the case within the principles discussed and decided in the case last cited. From a reservoir near Placerville a canal or flume extended to the south fork of the American river—about twenty-five miles. When the contract with Gordon was entered into, the flume was completed from the reservoir to Long canyon—eleven and two-thirds miles. Water flowing through it was used by means of several outlets for mining purposes. It was fed from sources other than the south fork. Gordon's contract was for the extension of this canal. The work commenced where the existing

work ended and reached to the south fork of the American river, the object being to make use of that river as a feeder and to increase the water supply. They were distinct works as having been completed at different times and by different contractors, and the upper section had already been in use. The points of identity were continuity and a common object, use, and ownership. The court below held that Gordon had a lien on the entire length of the canal. On appeal, the supreme court reversed the decree, holding that the lien extended only to that portion of the canal constructed by him. The Alessandro pipe line was already in use and was fed by water from Mill creek; it was no part of the plan to supply this pipe from the canal—on the contrary, the plan was to abandon the pipe line. Besides, it was totally inadequate to carry the water of the canal, and would have been useless when the canal was completed unless used to carry the water of Mill creek, in which case it would have been distinct from the canal.

Respondents claim that the wisdom of the decision of South Fork Canal Co. v. Gordon, 6 Wall. 561, has been questioned and was practically disapproved in Brooks v. Railway Co., 101 U. S. 443. The opinion in this latter case was written by Mr. Justice Miller (one of the dissenting justices in the former case), but I am unable to discover that any doubt whatever is cast upon the earlier case. ¹⁰¹ It is distinguished so clearly as that any criticism of it would have been gratuitous. Respondent cites the case of Creer v. Cache Valley Canal Co. (Idaho, Dec. 17, 1894), 38 Pac. Rep. 653. This case goes further in support of the judgment and order here than we think necessary.

We cannot perceive upon what principle the lien should be made compulsory as to division 3, or why it should be lost entirely because not claimed on the pipe line. Division 3 is not only incomplete, but there remain rights of way to be obtained without which the surveyed line and the work done have no value or utility. No one can say that it ever will be completed, and if so completed is yet remains to complete division 4 to make division 3 of value. The pleadings and liens would justify our holding that this division might be included, but we see no reason for compelling plaintiff to so extend its claim; nor do we see any legal ground upon which to do so.

2. Appellants allege error in the refusal of the court to allow their proposed amendment to their answer. It was objected to at the time it was offered because the material amendment related to matters about which there was up to that stage of the

trial no evidence, and because it presented a new issue; it was as to the existence of an entire system of which the canal formed a part. But the court subsequently let in all the evidence of appellants on that issue, and it has had consideration here; we cannot, therefore, see that they were injured by the ruling.

We are unable to discover any error in the judgment or order, and therefore advise that they be affirmed.

Haynes, C., and Belcher, C., concurred.

For the reasons given in the foregoing opinion the judgment and order are affirmed.

Harrison, J., Garoutte, J., Van Fleet, J.

MECHANIC'S LIEN—WHAT STRUCTURES SUBJECT TO.—A claim of lien can be filed and asserted upon several disconnected buildings without there being any account of the amount of materials furnished each, when they constitute part of the plant used in the business of smelting and are situated upon the same piece of ground: *Salt Lake etc. Co. v. Ibox Mine etc. Co.*, 15 Utah, 440; 62 Am. St. Rep. 944, and note. If a structure is of a substantial and permanent character, and may in any reasonable sense be known as a building, it may be encumbered by a mechanic's lien: *Wheeler v. Pierce*, 167 Pa. St. 416; 46 Am. St. Rep. 679. It has been held that a mechanic's lien may attach to a railroad bridge: *Smith Bridge Co. v. Bowman*, 41 Ohio St. 37; 52 Am. Rep. 66; to a copper kettle or boiler in a brewhouse: *Gray v. Holdship*, 17 Serg. & R. 413; 17 Am. Dec. 680. See monographic note to *La Crosse etc. R. R. Co. v. Vanderpool*, 78 Am. Dec. 694-699.

APPEAL—IMMATERIAL ERROR.—Error without prejudice may be disregarded on appeal: *Nave v. Adams*, 107 Mo. 414; 28 Am. St. Rep. 421. Thus the overruling of a demurrer to a plea cannot be reversible error, where the defenses are substantially availed of under other pleas: *Alabama etc. Ry. Co. v. Brooks*, 69 Miss. 168; 30 Am. St. Rep. 528; *Kansas City etc. R. R. Co. v. Higdon*, 94 Ala. 286; 33 Am. St. Rep. 119.

Mechanic's Lien—When May or Must Include Property in Addition to that upon Which the Work was Performed, or the Materials Furnished.

The principal case presents a question of considerable difficulty and upon which the decisions appear to be somewhat conflicting, though perhaps a close examination of them may demonstrate that their apparent conflict has resulted from conflicting provisions of the statutes of the several states respecting the topic under consideration. In truth, some of the dicta in the principal case are in conflict with the prior decisions of the same court, as where it is intimated on the authority of *Hill v. La Crosse etc. R. R. Co.*, 11 Wis. 214; and *Purtell v. Chicago etc. Co.*, 74 Wis. 132, that a lien may be enforced against a railway bridge or depot without including any other part of the system, and that where a claimant might have included in his claim or suit a greater extent of the defendant's property or ditches than he did, yet that he was at liberty to exercise an option, and that the defendant had no just cause of complaint

against the plaintiff for not pursuing his claim against all the property subject thereto. We are well satisfied with the conclusions of the court upon the questions necessarily involved in its decision and equally well satisfied with its dicta, for we think them sound upon principle, though manifestly in conflict with the prior decisions of the court.

Where There are Several Disconnected Houses on the Same Lot.—Upon the same lot or tract of land may be two or more structures, each of such a character that if it were there alone, a separate claim of lien might be enforced against it. Where such is the case, may a claimant proceed against one or all of the structures, or, if his right to proceed against all or more than one can be affirmed, does he lose his right to proceed against that one because he has not sought to subject the other or others to his claim? We here employ the word "structure" to indicate any thing or piece of property against which a lien can be claimed and enforced for work done or materials furnished upon or about it.

Several buildings may be disconnected and intended for separate occupation, and yet they may have been constructed for one owner and under a single contract in or by which no duty was imposed of keeping a separate account of the work done or materials furnished upon either. Where such is the case, a person furnishing materials or performing labor upon all the buildings may, in a majority of the states, include all in a single claim of lien and a single suit for its enforcement: *Meek v. Parker*, 63 Ark. 367; 58 Am. St. Rep. 119; *Booth v. Pendola*, 88 Cal. 36; *Premier etc. Co. v. McElwaine etc. Co.*, 144 Ind. 614; *Williams v. Judd-Wells Co.*, 91 Iowa, 378; 51 Am. St. Rep. 350; *Maryland etc. Co. v. Spilman*, 76 Md. 337; 35 Am. St. Rep. 431; *Glass v. St. Paul etc. Co.*, 43 Minn. 228; *Badger etc. Co. v. Holmes*, 44 Neb. 244; 48 Am. St. Rep. 726; *Lyon v. Logan*, 68 Tex. 521; 21 Am. St. Rep. 511. On the other hand, if the contract shows the amount of work or materials to be performed or furnished upon each building, each must be treated separately in the claim for a lien, and a claim of lien upon all the buildings cannot be sustained: *Buckley v. Commercial Nat. Bank*, 171 Ill. 284. In some of the states, however, the statutes controlling this subject have seemed to treat each building as distinct, and hence have been construed as not warranting any claim of lien extending to two or more distinct buildings. Thus, in Connecticut, it was said that the statute of that state "creates a lien upon every building in the construction or repair of which, or any of its appurtenances, the claim arose. It provides that such claim shall be a lien on the land on which the building may stand, the building and its appurtenances. It follows, therefore, that in order to be entitled to claim a lien pursuant to the statute on any building for work done upon any other building, the latter must either be an appurtenance of the former or land upon which it stands, as these terms are construed. And the same principle must apply when a lien is claimed upon several buildings for work done generally upon all": *Wilcox v. Woodruff*, 61 Conn. 578; 29 Am. St. Rep. 222; *Chapin v. Persee etc. Works*, 30 Conn. 461; 79 Am. Dec. 263.

The cases to which we have just referred involved claims of liens

upon two or more structures upon all of which the claimant had performed labor or furnished materials. Where, however, he has not done any work or furnished any materials for some of the buildings or structures, it would seem clear that his claim must be restricted to the building or structure upon which he did work or furnished material, except where several buildings or structures constitute a single plant, each being, irrespective of the date of its construction, a part of the common whole. In some of the states, however, the statute seems to attach the lien to a lot of land, and hence has been held to include buildings thereon to which the claimant did not contribute either labor or material. Thus, in Massachusetts, the owner of a lot on which four buildings were already erected and a stable intended for the use of such of the tenants as would pay the best rental therefor, contracted for the erection of two additional buildings without making any subdivision of his lot, and the contractor was held to have a lien upon the lot, including, as a part thereof, the four buildings in the erection of which he had no part: *Quimby v. Durgin*, 148 Mass. 104. Certainly, this decision is contrary to the general rule applicable to the subject, and we doubt whether it is necessarily sustained by the peculiar phraseology of the statute upon which it is founded. The statutes of Iowa provide that a mechanic or materialman who furnishes labor or material for any building or other improvement upon lands, by virtue of a contract with the owner or his agent, shall have a lien upon such building or improvement, or upon the lands belonging to such owner upon which the same is situated, and that the entire land upon which such building or improvement is situated, including the portion of the same not covered therewith, shall be subject to the lien. A building was erected upon a lot upon part of which another building already stood, the lot never having been divided, and the question then arose whether the materialman or mechanic had a lien on the house to the construction of which he had furnished nothing. The court held that the "statute should be so construed as to give a lien only upon the building for the erection of which the material was furnished or the labor done and upon the land upon which it actually rests, and, in addition thereto, upon the other land properly appurtenant to the building. Hence in this case, appellants would have no lien upon the other house or upon the ground occupied by it, not being properly appurtenant to the building for which the materials were furnished. Here material was furnished for a new house, an independent structure. Upon the same lot there is another house. The two buildings are not so situated as to be used by the same persons or as one dwelling-house, but they are separate and distinct; and a certain portion of the lot must, of necessity, or by reason of convenience, be used in connection with each house. In other words, in such a case the lien extends to the particular improvement and the land upon which it is erected and to such land surrounding the improvement as is properly appurtenant thereto": *Ewing v. Allen*, 99 Iowa, 379.

Work upon a Part of a Building or Other Structure.—Where work is done or material furnished in the construction or repair of a portion of a building, the lien extends to the whole thereof, though the

work consists in adding thereto a new apartment, as a kitchen or a new wing, and doubtless the claim of lien cannot, at the option of the claimant, be restricted to the new apartment or addition, where to so restrict it would prejudice the owner of the property by separating it into distinct fragments in the event of a sale to enforce the lien: *Nelson v. Campbell*, 28 Pa. St. 158; *Harman v. Cummings*, 43 Pa. St. 322; *Hershey v. Shenk*, 58 Pa. St. 382; *Lightfoot v. Krug*, 35 Pa. St. 348. In truth, the physical connection of its several parts is not necessary to constitute a single structure. If the apartments in a dwelling were separated by unenclosed and uncovered passageways, it might still be properly regarded as a unit, and a lien claimed and enforced accordingly. This is more commonly true of the buildings or structures forming part of a plant designed or used for the purpose of manufacturing or of carrying on some other business in which it is found desirable, convenient, or prudent to employ disconnected buildings instead of confining the operations within a single structure. If a boiler is in a building joined to a mill and used to supply steam for such mill, it is thereby made a part thereof, and if repairs are made upon such boiler, for which the repairer is entitled to a lien, he may enforce it against the whole property, including the mill and the land on which it stands: *Kelley v. Border City Mills*, 126 Mass. 148. Where a chimneystack was erected for the use of a distillery and of a house used for pork packing, and the distillery could be used only in connection with the pork packing house, it was held that a lien resulting from work done or materials furnished in the erection of such stack could be enforced against both buildings: *Bodley v. Denmead*, 1 W. Va. 249.

Separate Structures and their Appurtenances Intended for United Use. "Where several structures erected on a tract of land or lot are designed for a united enjoyment, the law treats them as a unit in relation to the liens which it gives. They are to be considered as constituent parts of a whole, incapable of separation without injury. An owner may see fit to have his kitchen not physically attached to his residence, although adjacent and upon the same tract. In such case it would be unreasonable to contend that the mechanic could have a lien only upon the latter for his labor in constructing it. This would practically amount to the denial of an absolute right given by statute. The kitchen alone would be valueless": *Cary etc. Co. v. McCarty* (Colo. App.), 50 Pac. Rep. 744. In this case, the plaintiff sought to foreclose a lien on the property of a smelting and refining company for work done and labor performed in furnishing, constructing, and erecting buildings and machinery for the use of a plant consisting of several buildings not under the same roof nor physically attached to one another, and it was claimed that a single lien could not be asserted against the whole, but that each building or structure should have been the subject of a separate claim of lien. The court further said: "In the case at bar, the object was to erect a plant consisting of buildings and machinery necessary for the smelting of ores. Either from choice or necessity, or both, some of the structures were physically separate, but all were essential component parts of the whole. The building in which was contained the principal machinery was useless and valueless without

the pumphouse, and so with the office and tramway. Each was necessary to the accomplishment of the object sought by the improvements, and, in the purview of the statute, did not become separate and distinct buildings simply because they were not physically attached, and because it was seen fit to designate the several component parts by distinct names": *Cary etc. Co. v. McCarty* (Colo. App.), 50 Pac. Rep. 750. The same principles were applied to another case involving a claim of lien against the property of a smelting company for furnishing material and constructing the smelter, scales, assay office, flumes or bins, boarding-houses, and other appurtenances. As against the contention that the claim of lien should have been for the amount of material furnished for each separate structure, the court said: "If each structure and the land on which it stands could be used for separate purposes and would be as valuable when so used as when used together as a smelting plant, there would be great force in the claim. But in view of the facts that the lumber was delivered under one contract and the structures were all erected on the same piece of ground, and they were all to be used together in prosecuting the business of smelting—the same purpose, the same enterprise—we are of the opinion that the lien existed on the entire premises for the lumber used in each structure, and that one lien could be decreed thereon for the security of the entire bill in the aggregate": *Salt Lake etc. Co. v. Ibex etc. Co.*, 15 Utah, 440; 62 Am. St. Rep. 944.

A refrigerator company erected a factory upon a lot belonging to it, and, by permission of the municipality, laid pipes in its streets connected with the factory and intended to be used in conveying vapor from it to customers. A contractor performed labor and furnished materials both in the erection of the factory and in laying the pipes. A statute of the state creating the lien declared that such lien should be upon any lot of ground or tract of land upon which a house has been constructed, built or repaired. It was insisted that this statute restricted the lien to the ground upon which the work had been done, and hence that the contractor could not have a lien upon the pipes in the streets as well as upon the building and the ground beneath it. The court, however, declared that the lien was manifest by the statute, and the law granting it should be liberally construed, and affirmed the right to a lien on the whole land, saying: "The business now contemplated is new in character and unfamiliar, but is not unlike, so far as connection between the generating point and the consumer is concerned, the arrangement of a gas company. The pipes are just as essential for carrying on the business as the machinery and buildings for manufacturing the product, and severance of either from the other destroys in like degree the efficiency of the whole. The pipes and license and easement under which they are laid would certainly pass under a sale of the property as an entirety and for operating purposes, no reservation being made. Taking into consideration the character of the plant as an entirety, we hold that the mechanics' lien extended over each and every part of it": *Steger v. Arctic etc. Works*, 89 Tenn. 453. This decision is supported by that in *Beatty v. Parker*, 141 Mass. 523, affirming that a drain pipe extending from the cellar of a building into a sewer of the street was a part of the house for the

whole of which a mechanic's lien could be asserted against the house and the land on which it stood, though the title of the street between the cellar and the line of the lot was vested in the municipality. So where it appeared that waterworks had been constructed consisting of a building and the machinery thereof and of pipes by which the water was distributed to consumers, it was held that the whole should be regarded as a unit, and that one entitled to a lien could enforce it against the building, the machinery therein, and the pipes connected therewith: *National etc. Works v. Oconto Water Co.*, 52 Fed. Rep. 43; affirmed without any further opinion, 59 Fed. Rep. 19.

In the cases hereinbefore cited, the separate structures were erected or the material therefor was furnished under a single contract. They are, therefore, not conclusive when the question presented is that of the adding to a pre-existing plant or manufacturing establishment of a single building or structure which, when erected and completed, is intended to be used as a part of the plant. In such a case, the taking away of the structure to be added might leave the plant as perfect as it had been before the erection of the additional structure, and the requiring of such additional building to be deemed a part of the unit consisting of the entire plant might be fraught with consequences extremely prejudicial either to the lien claimant or to persons having liens upon, or interests in, other parts of the property. The few cases which have been decided upon this subject agree to the conclusion that the claim of lien should be confined to the additional structure. In *Dalles Lumber Co. v. Woolen Mfg. Co.*, 3 Or. 527, the plaintiff claimed a lien for lumber and other material delivered and for labor performed in the construction of a woolen factory, dyehouse, dryhouse, and bleachhouse. Though the buildings were manifestly used as a part of a single plant, the court determined that each building must be the subject of a separate lien, saying: "That the buildings being separate and apart, the lien proper is on each building for the particular amount of lumber furnished for the same. For instance, suppose the main factory building had been completed before the dryhouse, dyehouse, or bleachhouse had been commenced, and the defendant should purchase lumber for the purpose of constructing the last three mentioned buildings, and after commencing them, the defendant should mortgage the same factory building, would it be right to allow the plaintiff's lien to extend to the main factory building and destroy the lien created by the mortgage, when no part of the lumber was used in that building? This would be contrary to the spirit and meaning of the law. It was only intended to be a lien on the particular building constructed by means of the labor or materials furnished for that purpose." In another case, the question presented was whether "a mechanic's lien for labor and materials employed and used in a dry kiln for drying lumber can properly be extended to a sawmill and planing-mill and the lots on which they stand as being appurtenant to the latter." While the dry kiln, undoubtedly, when constructed, became a part of the plant, it "was a separate venture made and undertaken after the completion and operation of the sawmill, and was conveniently placed for use in

connection with it, and was, for a time, used by the lumber company in drying lumber, manifestly for themselves and others at the sawmill." Under these circumstances, the court was of the opinion that this kiln was not an appurtenant to the other property, and hence that the claim of lien could not be extended over the whole plant: *McDonald v. Minneapolis etc. Co.*, 28 Minn. 262. A glass company, already in operation, had erected for its use a gas producer two hundred and eighty-nine feet distant from the principal building or factory. For moneys due and for his services in erecting such building, the contractor sought to assert a lien against the entire plant. "The auditor found as a fact that the building erected by claimant was a mere addition to the main building erected more than a year after the completion of the principal one, and was separate and distinct from it; that the lien should, therefore, have been filed against the separate structure, and could not be sustained against the entire plant." He hence disallowed the claim of lien, and, on appeal, his action was sustained by the supreme court: *Cowan v. Pennsylvania etc. Co.*, 184 Pa. St. 16.

Upon Railways and their Appurtenances.—Public policy forbids the separation of a railway into fragments, and a mechanic's, laborer's, or materialman's lien will not be allowed to be enforced so as to accomplish this result. If a statute purports to create a lien upon a railway in favor of persons performing labor or furnishing materials for its construction, it will be so construed as to create a lien against the railway as a whole. Though one or more divisions of the road have been completed and mortgages executed thereon, persons subsequently constructing other divisions are entitled to liens not restricted to such division, but extending over the whole road, and taking precedence over such mortgages: *Neilson v. Iowa etc. Co.*, 44 Iowa, 71; *Brooks v. Railway Co.*, 101 U. S. 443. Nor can contractors or others file and enforce liens at their option on the part of the road upon which they may have happened to perform labor or furnish material, but the lien must be claimed and enforced against the road as a whole, for if any contractor were, by the assertion of his lien, permitted to divest the title of the railway company to a bridge, another to a tunnel, a third to the section of the road graded by him, it would be so disconnected that it might no longer constitute a railway: *Cox v. Western etc. R. R. Co.*, 44 Cal. 18; *Farmers' etc. Co. v. Candler*, 87 Ga. 241; *Midland etc. Co. v. Wilcox*, 122 Ind. 84; *Knapp v. St. Louis etc. Co.*, 74 Mo. 374; *Ireland v. Atchison etc. Co.*, 79 Mo. 572; *Adams v. Grand Island etc. Co.*, 11 S. Dak., 239. If, however, a railway has been constructed and is in operation, and an extension is then projected and labor is done or materials are furnished thereon, we see no reason why the claim of lien may not be restricted to such extension: *Midland etc. Co. v. Wilcox*, 122 Ind. 84. It has, in one instance, been held that where the statute does not, in effect, purport to give a lien upon the road as a unit the lien claimant may either enforce it against the whole road or confine it to the particular portion upon which he has performed services or for which he has furnished material: *Giant etc. Co. v. Oregon Pac. Ry.*, 42 Fed. Rep. 470. We think, however, that upon principles of public policy this decision cannot be

sustained. Still, what shall be the public policy is the subject of legislative control, and the legislature may, by declaring that a lien shall exist upon or against a particular class of structures, authorize the enforcement of such lien, though in doing so a part only of a railway may be affected. Thus, if a statute declares that every person performing labor or work in or about the erection of any bridge shall have a lien thereon and upon the interest of the owner of such bridge in and to the land upon which the same is situated, it is applicable to bridges forming part of a railway, and one entitled to a lien on such a bridge may enforce it without including therein any other part of such railway: *Purtell v. Chicago etc. Co.*, 74 Wis. 132. In the same state it has been held that a mechanic's lien may be enforced against a railway depot and the block upon which it is situated, on the ground that it is not until the property has been acquired by the railroad corporation divested of all liens that it can be claimed to constitute a part of the road, the separation of which from the residue is forbidden by public policy: *Hill v. La Crosse etc. Co.*, 11 Wis. 214. Where one statute purports to create a lien in favor of every person furnishing labor or materials in the construction of a building, and another gives a lien to every person rendering services in the construction, grading, or building of any railroad, and provides that the lien shall attach not only to the real estate of the corporation, but to the right of way, material, equipment, rolling stock, and franchises, one who constructs, or aids in the construction of, a depot, is not required to proceed under the act specially referring to railways, but, as he comes within the terms of the act relating to buildings, may proceed under that act, though the building constructed by him is intended for use as a part of a railway system: *Botsford v. New Haven etc. Co.*, 41 Conn. 454.

Mining Claims.—Applying the principle of the case last cited, it would seem that where a statute creates a lien in favor of persons doing work upon a building or other specified structure, the right to the lien must exist against a structure of the character specified, though intended for use as a part of some other thing which has also been declared to be subject to a mechanic's or materialman's lien, as where such building or structure is intended for use by a railway or as part of a manufacturing plant or of a mining claim or of a system of supplying and distributing water. This conclusion, however, as applied to mining claims is controverted by the courts of California. Section 1183 of the Code of Civil Procedure of that state creates a lien in favor of every person performing labor or furnishing materials to be used in the construction, alteration, or repair of any building, wharf, bridge, ditch, flume, aqueduct, tunnel, fence, machinery, railroad, wagon road, or other structure, and also declares that any person who performs labor in any mining claim or claims has a lien upon the same, and the works owned and used by the owners for reducing the ores from such mining claims or claims for the work or labor done or the materials furnished. One who furnished materials for the construction of a mill, tramway, boarding-houses, and other buildings filed a claim of lien restricted to the works upon which he had furnished ma-

terial, while other persons also furnishing materials upon the same buildings filed a claim of lien against the whole mining claim; and the question then arose as to whether the claim thus restricted to certain buildings was invalid, because not extended over the whole claim. The court held that the whole mining claim must be regarded as a structure within the meaning of the statute. Hence upon the theory that the claim could not be restricted to a part of a structure, it denied the right to a lien upon the reduction works alone, saying: "One who has built a chimney in a house, or a porch, or a doorstep has helped to build a structure, to wit, a chimney, a porch, or a doorstep, but he cannot acquire a lien upon these specific structures, and, by detached sales, destroy the value of the claims depending upon liens upon the whole house. A structure may be a part of another larger structure, and, in reference to it, constitute but a part of a structure. In such cases it is well settled the lien must cover the entire structure: *Williams v. Mountaineer etc. Co.*, 102 Cal. 134. If several mining claims, located on the same ledge, are consolidated into one ownership and worked as one mine, they may thereafter, for the purposes of the mechanic's lien law, be regarded and treated as a single claim, and for work done upon any part of either a lien may be claimed and asserted against the whole property thus consolidated: *Hamilton v. Delhi etc. Co.*, 118 Cal. 148.

Ditches and Irrigating Works.—A system for storing water and supplying it to consumers, whether for irrigation purposes or for domestic and municipal uses, bears close analogy to a railway system, in that it may consist of many distinct parts used for a common purpose, and public policy is opposed to the separation of those parts if thereby the efficiency of the whole will be destroyed or substantially impaired. In the principal case and the unreported case of *Russ Lumber etc. Co. v. Bear Valley Co.*, 52 Pac. Rep. 1131, it was insisted, in the argument, that the entire property of the defendant, consisting of many ditches, franchises, reservoirs, pipe lines, and of offices and other buildings, constituted a single plant all united to catch, store, and distribute water, and hence, as in the case of a railroad or of a mining claim, no lien could be asserted against any fragment thereof, and whether this were true or not, that the work done by the plaintiffs had been upon a section of a canal, the construction of which was contemplated by the defendant, that the canal had been laid out the whole contemplated length, rights of way procured, and some disconnected work done in the way of grading and of excavating tunnels, and that the claim of lien and the suit for its enforcement ought at least to include the entire canal as thus projected. The appellate court treated the two suits as involving the same question, but they differed in this, that in the principal case the claim of lien was for the whole of the canal as projected, while in the unreported case it was only upon the division upon which the plaintiff had furnished material, and which had been finally substantially completed. This difference was worthy of, but did not receive, consideration by the court; for it must often happen that a line of railroad or of a ditch or canal is projected to extend from one well-known point

to another, the construction of which proceeds in sections. In such a contingency, the question must again be presented, as it was in the unreported case, whether one who does work on the first section and becomes entitled to a lien may confine his claim to such section, or must extend it over the whole contemplated line of road or canal. The unreported case is authority for the proposition that the claim of lien may be restricted to the section upon which the work has been done, especially where it happens that thereafter and up to the filing of the claim and the trial of the suit no substantial progress is made upon the balance of the contemplated line.

There is no doubt that in some instances one who has done work upon an irrigation canal may be entitled to a lien not only upon the whole thereof, but also upon land for the use of which it is intended, and when the statute purports to create a lien not only on the ditch, but also on the land through which it is constructed, or so much of the land about the same as may be required for its use, to be determined by the court in rendering judgment. Under a statute of this character, one performing work upon a ditch was adjudged to be entitled to a lien on the twenty-two thousand acres of land on which the waters conducted by the ditch were intended to be used: *Springer etc. Assn. v. Ford*, 168 U. S. 513.

We apprehend that since the decision in the principal case, it must be regarded as established that the construction of a new canal, though intended as an extension of a pre-existing system, does not require, and perhaps does not authorize, a claim of lien over the pre-existing parts of the system, all of which were in use before the construction of the extension and remained capable of use without it. In Colorado, it has been held that a lien may be asserted upon an independent structure, though constituting part of a canal or system of canals, as where a flume is built "entirely disconnected and separated at both ends from other portions of the canal which had theretofore been constructed": *Jarvis v. State Bank*, 22 Colo. 309; 55 Am. St. Rep. 129. The question involved in the principal case was substantially decided by the supreme court of Idaho in 1894, in a case in which it appeared that the plaintiff had constructed, or aided in the construction of, a ditch or section of a main canal, and he claimed and sought to enforce a lien against this branch section. In opposition to the claim, it was insisted that no lien could be asserted except as against the entire canal. The court, in affirming the decision of the trial court sustaining the lien as claimed, said: "In other words, the appellant's claim that if the plaintiffs had asked a lien upon the whole system of canals, they might have obtained it, complaining that the plaintiffs did not ask of the court all that they were entitled to, and therefore they should not have a lien upon any part of the canal. The appellants demand that the case should be reversed because the plaintiffs did not claim all they should have. The appellants can hardly be heard in such a complaint. But is the position itself tenable? The north and south branches of the Cache Valley Company's canal are, as appears by the record, separate and distinct pieces of property, each a number of miles in length, partly supplied with water

from reservoirs, and partly from the main canal above them. The contract was made by the company with the plaintiffs to construct these branches separate and apart from the main canal, the north branch wholly, and all of the south except four and a half miles, which had been constructed before this contract was made. They are distinct pieces of property, although a part of the system of canals belonging to this company. All of the work for which plaintiffs claim this lien was done on these branches, and under a contract to construct these branches which does not mention the main canal. This had been, therefore, constructed. We think this lien can be obtained upon this part of the system. The Cache Valley Canal Company, in its answer, alleges that the plaintiffs agreed to build and construct two certain branches or ditches, calls them 'canals or ditches' throughout the answer, and gives no notice that it owns or did own any other canal. No other property than that described in the notice is hinted at in the answer. The defendants themselves considered them independent pieces of property, as appears by the contract for their construction, and the answer to the complaint. But, if not entirely independent, this lien would attach to the property constructed by these plaintiffs, as it is so held in *Hill v. Railroad Co.*, 11 Wis. 225; *Phillips on Mechanics' Liens*, sec. 182. These branches do not become a part of the system until fully constructed, and the lien thereon for the work done discharged. A careful examination of the cases cited by both counsel for the defendants and for the plaintiffs will disclose the fact that where a mechanic has asked for a lien upon the entire property for work upon a part, his claim has been allowed, and where he asked for a lien upon a distinct part, that has been also allowed. In either case the law has been construed liberally in favor of the party asking the lien": *Creer v. Cache Valley etc. Co.* (Idaho), 88 Pac. Rep. 653. In the case of *Canal Co. v. Gordon*, 6 Wall. 561, one who had constructed an extension of a canal sought to enforce his claim of lien against the whole canal, and a decree in his favor was rendered by the trial court. On appeal, the decree was reversed, and the lien confined to the part of the canal upon which the complainant had done work. The appellate court, in its opinion directing such reversal, said: "We have already shown that the upper and lower sections were distinct works in several essential particulars, to which we need not again advert. The lower one having been finished and in use before the upper one was contracted for, if those having a lien upon the former had insisted that it became extended over the latter as soon as the latter was completed, no legal mind, we apprehend, could have doubted that the claim could not be sustained. If it could, Gordon's lien might have remained valueless. We think the converse of this proposition applies with equal force. If a lien upon the lower section could not have been extended over the upper one, upon what principle can it be maintained that Gordon's lien embraced the lower section? A lateral feeder constructed and intersecting the main line after it was completed would certainly not be subject to a previous lien upon the main line, if such a lien existed. We can see no substantial difference between that case and the one before us. The upper section

was only an additional feeder. That it was an elongation of the main line, and not a lateral work, does not affect the principle involved. The controlling circumstance and the object in both cases would be the same. We think the language of the statute, rightly interpreted, is decisive. The lien is given to contractors and laborers upon the ditch or flume, 'which they may have constructed or repaired, to the extent of the labor done and materials furnished.' He had nothing to do with the lower section. So far as he was concerned, and for all the purposes of this litigation, they were distinct and independent works. A different principle would produce confusion and lead to serious evils. We have no difficulty in coming to the conclusion that the decree in this particular is erroneous."

We think it fairly inferable from the decisions cited that, with the possible exception of mining claims, for work done in constructing an extension of a pre-existing plant or system, as of a line of railway or of a canal, or a new branch or feeder of either a claim of lien may be made and enforced against such extension, or new branch, or feeder, without including the pre-existing parts of the system. Furthermore, we think the same rule should extend to independent buildings and other structures, such as depots, flumes, and the like, where the system was in operation before their construction, and can continue to be operated without them, and their sale under the lien cannot contravene public policy by destroying, or substantially impairing the efficiency of, the pre-existing line or plant. It frequently happens that a railway or canal is subject to a mortgage or trust deed purporting to embrace all extensions thereof, and all additions thereto. If, after apparently completed and in successful use, extensions are projected and constructed, and those who aid in their construction by furnishing material or performing labor remain unpaid and seek to claim and enforce liens for their reimbursement, one of three rules must be adopted: 1. Treat their lien as extending over the whole plant, but as subordinate to prior liens; 2. Treat the liens for construction as extending over the whole plant and as paramount to the pre-existing mortgages and trust deeds; or 3. Treat the extension or other new structure as an independent enterprise so far as the claims of persons aiding in its construction are involved, awarding them the right to subject it to their claims, and denying them all lien against the pre-existing plant, at least as against persons having liens thereon of prior date. The mode or rule last suggested seems to us the most equitable and the most in harmony with the intentions and reasonable expectations of all parties.

MADERA FLUME AND TRADING Co. v. KENDALL.

[120 CALIFORNIA, 182.]

MECHANIC'S LIEN.—A NOTICE OF A CLAIM for a mechanic's lien which states the name of the contractor and of the owner of the property, but omits to state the name of the person for whom the claimant furnished material, is fatally defective.

MECHANIC'S LIEN.—A NOTICE OF A CLAIM for a mechanic's lien required to be made and filed for record cannot be amended or reformed. The notice of the claim must be perfect when filed.

MECHANIC'S LIEN—ORAL CONTRACT.—The fact that a contract is oral does not relieve the claimant of a mechanic's lien from complying with the provision of the statute requiring every person to state in his claim or notice of lien the facts specified in the statute.

MECHANIC'S LIEN—PERSONAL LIABILITY.—An owner of property who fails to have recorded his contract with the original contractor is not thereby made personally liable to a subcontractor.

W. H. Larew and L. L. Cory, for the appellant,

Francis A. Fee, for the respondent.

¹⁸² **HARRISON, J.** Action to foreclose a mechanic's lien. The appellant entered into a verbal contract with one Price for the construction of a building upon certain lands of which he was ¹⁸³ the owner, at an agreed price of seventeen hundred dollars. The respondent furnished certain materials which were used in the construction of the building, and within thirty days after its completion filed with the county recorder its claim of lien therefor. The present action is brought for the foreclosure of this lien. Price was made a defendant with the appellant, but appears to have made no defense to the action, and the court rendered its judgment in favor of the plaintiff, directing a sale of the land in satisfaction of its claim, and that judgment be entered against the appellant for any deficiency in the proceeds of the sale. From this judgment and an order denying a new trial the defendant Kendall has appealed.

The notice of its claim filed by the plaintiff was insufficient to authorize an enforcement of the lien. Section 1187 of the Code of Civil Procedure declares that every person claiming a lien must file for record with the county recorder a claim containing a statement among other matters of "the name of the person by whom he was employed, or to whom he furnished the materials." The notice of its claim filed by the plaintiff

herein, after stating that it had furnished materials which were actually used in the construction of the building, stated:

"That William Price is the name of the contractor who on or about the first day of March, 1894, as such contractor and agent of the owner, B. F. Kendall, entered into a verbal contract with said Madera Flume and Trading Company, a corporation, under and by which said William Price was to furnish the material for the construction of said building." In this statement the plaintiff does not state that it furnished any of these materials to William Price, nor does it state the name of the person to whom it did furnish them. Not only does the statement fail to name the person to whom the materials were furnished by the plaintiff, but it is consistent with their having been furnished by it to some one other than Price, for whom he obtained them in fulfillment of his contract with Kendall. Nor is this defect aided by the averment in the complaint, that they were furnished to Price. The notice of lien which is filed for record must be complete in itself at that time in order to authorize its enforcement, and is not capable of being amended or reformed: *Goss v. Strelitz*, 54 Cal. 640. In *Santa Monica Lumber etc. Co. v. Hege*, 119 Cal. 376, 379, we said: "The right to enforce a mechanic's lien depends upon a compliance with the requirements of the statute. Unless the notice of the lien which is filed with the county recorder contains the statements required by section 1187 of the Code of Civil Procedure, the claimant is not entitled to his lien": See, also, *Wood v. Wrede*, 46 Cal. 637; *Phelps v. Maxwell Min. Co.*, 49 Cal. 336.

The fact that the contract was verbal, and not recorded, did not relieve the claimant from compliance with the provisions of section 1187. That section declares that "every person" seeking the benefits of that chapter must state in his claim of lien all of the facts therein specified: *Davis v. McDonough*, 109 Cal. 547.

The judgment is also erroneous in directing the deficiency of the proceeds to be docketed as a judgment against the appellant. Section 1183 of the Code of Civil Procedure does not provide that the failure to have the contract in writing and recorded shall render the owner personally liable, but that the persons performing labor and furnishing materials in such cases "shall have a lien for the value thereof": *McMenomy v. White*. 115 Cal. 339.

The judgment and order denying a new trial are reversed.

Garoutte, J., and Van Fleet, J., concurred.

MECHANIC'S LIEN CLAIM—SUFFICIENCY OF.—A notice or claim of a mechanic's lien must state, either directly or by necessary inference, the name of the person to whom the claimants furnished the material or for whom they performed the labor; otherwise, no lien can be enforced: *Getty v. Ames*, 30 Or. 573; 60 Am. St. Rep. 835, and note. See, also, *Mitchell Planing Mill Co. v. Allison*, 138 Mo. 50; 60 Am. St. Rep. 544, and note; *Wharton v. Real Estate Inv. Co.*, 180 Pa. St. 168; 57 Am. St. Rep. 629, and note. Such a notice or claim is not an instrument susceptible of reformation: *Fernandes v. Burleson*, 110 Cal. 164; 52 Am. St. Rep. 75, and note.

MECHANIC'S LIEN—ORAL CONTRACT.—A contract to afford a foundation for a mechanic's lien need not be in writing, the statute not requiring it: *Neilson v. Iowa etc. R. R. Co.*, 51 Iowa, 184; 33 Am. Rep. 124. The mere fact that materials are furnished or work done does not alone constitute a lien, where the statute provides that a lien may be acquired by filing a notice in the recorder's office: *Green v. Green*, 16 Ind. 253; 79 Am. Dec. 428, and note.

MECHANIC'S LIEN—RIGHTS OF SUBCONTRACTORS.—A subcontractor is chargeable with notice of all the terms and stipulations of the contract between the original contractor and the owner, and is bound by them, whether he had actual knowledge of them or not: *Bevan v. Thackara*, 143 Pa. St. 182; 24 Am. St. Rep. 529, and note.

LONDON AND SAN FRANCISCO BANK v. BANDMANN.

[120 CALIFORNIA, 220.]

MORTGAGE—CHANGE IN THE FORM OF THE DEBT — STATUTE OF LIMITATIONS.—A change in the form of a debt secured by a mortgage does not satisfy it. Though such debt was evidenced by notes which have become barred by the statute of limitations, yet if new notes have been given therefor, so that the mortgagee still retains a right of action on them, the mortgage can be foreclosed irrespective of the lapse of time, where the mortgage describes no particular notes, but purports to be to secure "the present indebtedness" of the mortgagor to the mortgagee and such advances as may thereafter be made by the latter to the former.

MORTGAGE—CHANGE IN THE FORM OF THE DEBT.—A statute providing that a mortgage shall not be created, renewed, or extended except by a writing executed with the formalities required in the case of a grant of real property, does not prevent the mortgage from continuing to operate as security for indebtedness, the form of which has been changed by giving a new note therefor, though but for the giving of such new note the pre-existing evidence of indebtedness would be barred by the statute of limitations.

MORTGAGE—AGREEMENT TO PAY TAXES.—A separate agreement by a mortgagor to pay taxes on the lands mortgaged not incorporated in the contract of mortgage does not forfeit or otherwise affect the mortgagee's right to collect the interest stipulated for in such mortgage.

MORTGAGE—WAIVER OF RIGHT OF THE MORTGAGEE ARISING FROM A FORBIDDEN AGREEMENT TO PAY TAXES.—Where the laws of a state provide that the mortgagee shall pay taxes on his mortgage interest and that any agreement to the contrary shall deprive the mortgagee of all right to collect

interest, the mortgagor, after paying interest in accordance with a forbidden agreement, cannot complain.

Robert Harrison, for the appellants.

Page & Fells, for the respondent.

²²¹ GAROUTTE, J. This action is brought to foreclose a mortgage executed July 21, 1888. This mortgage was given to secure "the present indebtedness of Julius Bandmann to said bank, and such advances as said bank may hereafter make to said Julius Bandmann, with interest thereon at the rate of eight per cent per annum." The case is now before us upon an appeal from the judgment without a bill of exceptions. By the findings of fact it appears that at the time the mortgage was given Bandmann was in debt to the bank in the sum of about sixty-eight thousand dollars, which indebtedness was evidenced by two promissory notes. Subsequently these two notes were taken up and new notes given in lieu thereof. Advances were also made by the bank to Bandmann during this time, which were likewise evidenced by notes. Various payments upon some of these notes were made by Bandmann. The moneys so applied were the proceeds of sales of personal property also held by the bank as security for this indebtedness. Upon March 31, 1894, a settlement of the parties was had, and the indebtedness of Bandmann to the bank was thereupon ascertained to be forty-two thousand two hundred and fifty dollars, and a new note given for that amount, all former notes being surrendered and canceled. This new note included the balance of the old indebtedness, and all advances which had been made up to that date. Thereafter an additional advance of one hundred and ninety-one dollars and sixteen cents was made to Bandmann, and a note taken for that amount. It is now sought to foreclose the aforesaid mortgage ²²² to secure the payment of the two notes last mentioned. After these two notes were given, and prior to the commencement of the action, Julius Bandmann conveyed the mortgaged property to Charles Bandmann, who is made a party defendant.

Section 2911 of the Civil Code reads: "A lien is extinguished by the lapse of the time within which, under the provisions of the Code of Civil Procedure, an action can be brought upon the principal obligation." As shown by the finding of facts made by the trial court, it appears that the sixty-eight thousand dollars of indebtedness existing at the time the mortgage was given, July 21, 1888, was evidenced by two certain promissory notes.

It is now claimed that these notes were the "principal obligation," and that no action could be brought upon them after July, 1892, and hence the lien of the mortgage became extinguished at that time by virtue of the provisions of the section of the code we have quoted. The mortgage was given to secure a "present indebtedness," and this present indebtedness, and not the notes, was the "principal obligation" called for by the foregoing section of the code; and as long as that indebtedness was kept alive, as long as an action could be brought to recover the debt, the mortgage lien was not extinguished. At the time this action of foreclosure was brought the indebtedness was still owing and recoverable in law. It was evidenced by a promissory note, to be sure, but that fact was immaterial. It was said in *Flower v. Elwood*, 66 Ill. 446: "As a general rule, the mere change in the form of the debt does not satisfy a mortgage given to secure it, unless it is intended to so operate. The lien of the debt attaches to the mortgaged property, and the lien can, as between the parties, only be destroyed by the payment or discharge of the debt, or by a release of the mortgage. Mere change of the form of the evidence of the debt in nowise affects the lien." The same rule stands equally good as to the advances made. These advances were the "principal obligation," and as long as they were kept alive the mortgage lien secured their payment. Whatever might be the law of the case, if this mortgage had been given to secure the payment of a certain promissory note, describing it, we are not now concerned. We have no such case. Here the mortgage was given to secure a certain described indebtedness. Whether in fact it was then evidenced ²²³ by a note or other writing is not important. Again, while this indebtedness was subsequently evidenced by a note, still it was the same indebtedness for which the security had been given, and the statute of limitations had not run against it. Hence, the mortgage lien was alive. If this mortgage had been given to secure a certain promissory note, describing it, "and all renewals thereof," there could be no question but that the renewal notes would be secured by the mortgage. Yet, if the original note stands alone as "the principal obligation" referred to in section 2911, the lien would not survive the renewal; but upon such a state of facts the note given and the renewal notes to be given constitute the principal obligation, and hence the mortgage lien, under such circumstances, would not be extinguished until the statute had run against any and all renewal notes given as provided in the mortgage.

Appellant invokes section 2922 of the Civil Code to support

his contention. That section provides: "A mortgage can be created, renewed, or extended only by writing executed with the formalities required in the case of a grant of real property." It is now insisted that the subsequent giving of a promissory note to cover the indebtedness mentioned in this mortgage was violative of this section of the code, as being a renewal or extension of the mortgage without a writing indicating such intention. The section is a duplicate of section 1623 of the Field Civil Code of the State of New York, and, as appears by the note and cases thereunder cited, the term "extended," as here used, refers to a broadening of the security to cover additional advances. In the present case there is no attempt to "create" or "renew" a mortgage. This mortgage was created on the date of its execution, and has never needed to be renewed; for, as already declared, the principal obligation was not barred by the statute of limitations when the action of foreclosure was begun. In *Wells v. Harter*, 56 Cal. 342, it was held that the renewal of a note after action upon it had been barred by the statute could not create a mortgage. In that case, while once there had been a mortgage, it had expired by the running of the statute against the note. Consequently, both sections of the code heretofore quoted point to the soundness of the conclusion there reached by the court. In that case the mortgage ~~was~~ was dead by mere lapse of time. In renewing the note it was not even attempted to reanimate the dead mortgage, even conceding such a thing would have been possible. In *German Sav. etc. Soc. v. Hutchinson*, 68 Cal. 52, a mortgage was given to secure a certain promissory note, describing it. Subsequently the time of payment of the note was extended in writing, wherein a continuation of the mortgage was specially agreed upon as security for the note as changed. Upon such a state of facts, this court held a compliance had been had with section 2922 of the Civil Code. The soundness of this doctrine we heartily concede.

The mortgage in this case assumed the form of a deed and defeasance. Bandmann, by his answer, alleged that plaintiff required him to enter into an agreement to pay the taxes upon the land mortgaged without any diminution of the amount by reason of the mortgage. Upon this matter it may be conceded the court found the fact substantially as alleged. Yet such allegation and finding are not broad enough to establish an agreement violative of the provisions of the constitution relating to contracts wherein mortgagors agree to pay the taxes assessed

upon the mortgage. There are two reasons, and possibly others, why upon this record this provision of the constitution cannot be invoked here: First, by the finding it does not appear that this agreement of the mortgagor to pay the taxes upon the land was a part of the contract of mortgage. If it was a separate agreement, if it was no part of the contract of mortgage, then it has no force here, for it is only the interest specified in the contract that is made uncollectible for a violation of this provision of the constitution. There is no interest "specified" in this contract to pay the tax, unless the agreement be construed as part of the mortgage contract, and unless so construed the provision can have no application: *Daw v. Niles*, 104 Cal. 111. Again, in this case the interest has been paid by the mortgagor in accordance with his agreement, and now it is too late for him to complain: *Harralson v. Barrett*, 99 Cal. 607. The fact that this interest was paid largely from the proceeds of sales of pledged personal property does not change the complexion of the transaction, especially as the application of these proceeds to the payment of the interest must of necessity have been ~~was~~ ratified by the mortgagor when the balance arising from the settlement of all previous payments of every kind and character was merged in the note upon which this action is brought.

There was included in the large note forming the basis of this action the amount of a one thousand dollar note held by plaintiff and executed by the firm of Bandmann, Nielson & Co. It nowhere appears by the findings of the court that the amount evidenced by this note was either a present indebtedness of Bandmann at the time the mortgage was given, or that it was an advance. It therefore appears that the mortgage furnished no security for its payment, and to that extent the judgment is too large.

For the foregoing reasons, the judgment and order are reversed and the cause remanded, with directions that the trial court enter judgment in accordance with the views here expressed.

Harrison, J., and Van Fleet, J., concurred.

MORTGAGES—DESCRIPTION OF DEBT.—A mortgage, to be valid, must in some way describe and identify the indebtedness it is intended to secure. Literal accuracy is not required, but the description of the debt must be correct so far as it goes, and full enough to direct attention to the sources of information in regard to it, and be such as not to mislead or deceive as to the nature or amount of it: *Bowen v. Ratcliffe*, 140 Ind. 393; 49 Am. St. Rep.

203, and extended note; extended note to North v. Belden, 35 Am. Dec. 87.

MORTGAGES—CHANGE IN FORM OF DEBT SECURED.—A mortgage secures a debt or obligation, and not the evidence of it, and no change in the form of the evidence, or in the mode or time of payment, can operate to discharge the mortgage. So long as the debt secured remains unpaid, neither the renewal or substitution of the evidence of the debt will impair the lien of the mortgage: See monographic note to Dumell v. Terstegge, 85 Am. Dec. 467-471. But renewal notes given for notes not described in a mortgage are not secured by such mortgage: Bowen v. Ratcliff, 140 Ind. 803; 49 Am. St. Rep. 203.

FALK v. WITTRAM.

[120 CALIFORNIA, 479.]

WITNESSES.—THE WIFE OF AN INSANE HUSBAND cannot testify for him, if the statute declares that a wife cannot testify for or against her husband without his consent. Being insane, he cannot grant such consent.

EVIDENCE TO SHOW THAT A DEED WAS INTENDED AS A MORTGAGE.—Where a deed purports to be absolute, a trial court is justified in requiring clear proof that it was intended as a mortgage.

Joseph M. Kinley and Murphy & Gottschalk, for the appellant.

Goodcell & Leonard, for the respondent.

⁴⁸⁰ **HARRISON, J.** The appellant, by his guardian, seeks in this action a judgment declaring that an instrument purporting to convey certain land to the grantor of the respondent was made by the appellant at a time when he was insane and incapable of contracting; that the instrument, although absolute in form, was in reality only a mortgage, and that the respondent took his conveyance from the grantee therein with knowledge of the appellant's insanity at the time of its execution, and that it was given only as a mortgage. The instrument in question was executed April 14, 1875, and on January 31, 1893, the guardian of the appellant was appointed by the superior court of San Francisco, and the complaint herein in behalf of the appellant was filed March 20, 1894. Issues having been joined upon the allegations of the complaint, the cause was tried by the court, by whom findings of fact were made and filed negating the material allegations of the complaint, and judgment thereon was rendered ⁴⁸¹ in favor of the respondent. From this

judgment and an order denying a new trial, the present appeal has been taken.

The appeal is urged here upon the ground that the findings of the court, both upon the insanity of the appellant at the date of the deed of conveyance, and the character of the instrument, are not sustained by the evidence. Each of these propositions was determined by the trial court upon a consideration of all of the evidence before it, including the inferences which it was at liberty to draw from that evidence, and the weight to be given to the testimony, as well as the credibility of the witnesses. It was shown that the appellant was engaged in business for upward of eleven years after the date of the conveyance before he was committed to an asylum; and, although it was shown that he was rash in some of his speculations, and erratic in conduct, as well as irascible in temper, it cannot be said that there was no evidence before the court in support of its finding that he was not insane at the date of the conveyance, and, upon well-established principles, its finding is conclusive here. There was no direct evidence in support of the appellant's claim that the deed was intended as a mortgage, but it was sought to establish this fact by inferences and argument to be drawn from other evidence in the case. Upon its face, the deed purported to be absolute, and the trial court was justified in requiring clear proof that it was intended as a mortgage.

As the court found that the deed from the appellant to the respondent's grantor was an absolute conveyance, and that he was in the exercise of his mental faculties at the time of its execution, its failure to find whether the respondent had notice of these facts is immaterial. If they did not exist, he could not have had notice of them, and a finding of that character would not affect the judgment.

The court properly excluded the deposition of the plaintiff's wife. "A husband cannot be examined for or against his wife without her consent; nor a wife for or against her husband without his consent; nor can either during the marriage or afterward be, without the consent of the other, examined as to any communication made by one to the other during the marriage": Code Civ. Proc., sec. 1881, subd. 1. The section makes no exception to the rule, even though the other spouse be incapable of consent, and courts are not at liberty to disregard its provisions: See, also, *Estate of Flint*, 100 Cal. 391; *Emmons v. Barton*, 109 Cal. 662.

The Garcia deed could have had no effect upon the findings

of the court, and, even if its admission was unauthorized, it was harmless to the appellant.

The judgment and order are affirmed.

Garoutte, J., and Van Fleet, J., concurred.

MORTGAGE—DEED ABSOLUTE CONSTRUED AS.—A deed should not be declared a mortgage unless the evidence leaves in the mind of the trial judge a clear and satisfactory conviction that the instrument, which in form is a conveyance, was, by all the parties thereto, intended as a mortgage: *Mahoney v. Bostwick*, 98 Cal. 53; 81 Am. St. Rep. 175, and note as to the character of evidence required. The evidence must be clear, certain, unequivocal, and trustworthy: *Perot v. Cooper*, 17 Colo. 80; 31 Am. St. Rep. 258, and note; clear and convincing; *Kelthley v. Wood*, 151 Ill. 566; 42 Am. St. Rep. 265, and note; clear, precise, and indubitable: *Wallace v. Smith*, 155 Pa. St. 78; 35 Am. St. Rep. 868. See *State Bank v. Mathews*, 45 Neb. 659; 50 Am. St. Rep. 565.

RUSS LUMBER AND MILL COMPANY v. MUSCUIABE LAND AND WATER COMPANY.

[120 CALIFORNIA, 521.]

INDEPENDENT CONDITIONS, WHEN BECOME DEPENDENT.—If a contract contains stipulations which are not concurrent nor dependent, but one of the parties makes default in an act required to be performed by him by the conditions of his contract, all the preceding agreements of the contract remaining unperformed by him must be treated by him as concurrent, since he cannot enforce performance while himself in default.

CONSIDERATION—FAILURE OF OCCURRING AFTER THE TRANSFER OF PROMISSORY NOTES.—Where promissory notes are given in consideration of an agreement that the payee will thereafter perform certain conditions, and he is, when demanded, unable to comply, or refuses to comply, with such conditions, there is a failure of the consideration upon which the notes were executed.

NEGOTIABLE INSTRUMENTS—RESCISSION CANNOT AFFECT THE INDORSEE.—Though the maker of a negotiable promissory note becomes entitled to rescind, he cannot exercise his right to the prejudice of an indorsee who has received the notes in the usual course of business, in good faith, for value, and without notice of the facts upon which the right to rescind is founded.

NEGOTIABLE INSTRUMENTS.—An indorsee of a negotiable promissory note for value, in good faith, and before maturity, cannot be affected by a subsequent breach of the contract made by the payee and constituting the consideration of the note.

THE RESCISSION OF A CONTRACT IS NOT REQUIRED where nothing of value has been received under it and the party making it cannot perform it.

RESCISSION—OFFER TO SURRENDER—WHEN NOT NECESSARY.—If negotiable promissory notes are given in con-

consideration of an agreement to furnish water for irrigation, and such agreement is pledged as collateral security for the payment of such notes, and after their transfer the original payee is unable to perform his agreement, there is a failure of consideration, and it is not necessary for the maker of the notes to offer to release the payee from the agreement as a condition precedent to the right to rescind or to defend against the notes for failure of consideration.

CONSIDERATION.—A FAILURE of consideration, either total or partial, may be pleaded as a defense to an action upon a promissory note either wholly or in pro tanto.

CONTRACTS—WHEN MAY BE AVOIDED FOR FAILURE OF THE PROMISEE TO PERFORM AN ACT IN THE FUTURE. If the promise to do an act is accompanied with statements of existing facts showing an ability of the promisor to perform his promise, such statements are called representations, and if falsely made, are grounds for avoiding the contract, though the promise to be performed lies wholly in the future.

CONTRACTS FOUNDED ON FALSE REPRESENTATIONS.—A promise made with an intention not to perform it constitutes a fraud for which a contract may be rescinded or avoided.

ONE WHO TAKES A COLLATERAL SECURITY FOR A PRE-EXISTING INDEBTEDNESS must be regarded as a holder for value.

Gardner, Harris & Rodman, and L. R. Garrett, for the appellant.

Freeman & Bates, for the respondent.

⁶²³³ **HAYNES, C.** This appeal is from a judgment in favor of the plaintiff upon demurrer to defendant's answer. Both parties are corporations. The action is prosecuted to recover certain semi-annual installments of interest accrued upon five promissory notes executed by the defendant to the Bear Valley Irrigation ⁶²³³ Company (also a corporation), and by it indorsed to the plaintiff in September, 1893.

Said notes bear date September 29, 1891, and are payable, respectively, five, six, seven, eight, and nine years after date, each for the sum of three thousand dollars. The interest on all the notes had been paid by defendant to September 29, 1893, and this action was commenced July 24, 1895.

It is stipulated that the answer to each of the five causes of action is identical with the others, and hence only the answer to the first cause of action is printed in the transcript, but as that covers fifteen printed pages it cannot be given here in full. An outline of the defense pleaded, with perhaps some more specific notice of particular allegations as we proceed, is all that is necessary.

The answer alleges that the notes were executed in consideration of a contract entered into between it and the Bear Valley

Irrigation Company, whereby the irrigation company sold and agreed to deliver a specified quantity of water per acre to the defendant to irrigate one hundred and thirty acres of land; that said contract on the part of the irrigation company was in writing, and consisted of what is designated as "Class B, 200 cfs. Bear Valley Irrigation Company Acre Water Right Certificate," a copy of which is set out in the answer. Each certificate required the defendant to pay one dollar and thirty-nine cents on the first day of April and the first day of October in each year, but it was agreed that this clause should not be operative until the defendant began the actual use of water, which use was to begin upon demand of the defendant.

These certificates also show upon their face that they were issued subject to certain contracts of the irrigation company to furnish water to other parties, as to some of which the quantity is specified and as to some it is not, and also subject to "Class A Certificates" issued by it, the number of which is not stated.

The sole consideration of the notes here in suit, it is alleged, was the said contract of the irrigation company evidenced by said certificates, and the consideration for said certificate was the execution of said promissory notes; that said certificate was attached ⁵²⁴ to said promissory notes as collateral security for the payment thereof, and remained so attached at the time of the transfer of the notes to the plaintiff, and was transferred with the notes and was afterward detached by the plaintiff. It is further alleged that defendant entered into said contract and executed said notes upon the representation of the irrigation company that it had the water so sold to defendant, and could then, or at any time thereafter, furnish the water agreed to be furnished upon demand; that it had an abundant supply of water to enable it to carry out said contract and the said preferred contracts; that it was solvent and in a prosperous condition financially, and operating its plant at a profit, and able to meet all its obligations; that defendant relied upon said representations, and upon the faith of them alone entered into said agreement and executed said promissory notes. It is then sufficiently alleged that these representations were each and all untrue, and at the time they were made, and ever since, were known by said irrigation company to be untrue; that at the time of making them it did not intend to furnish said water, and made them "with the purpose and object of defrauding this defendant out of the sum agreed to be paid in said promissory notes."

It is also alleged that at and before the transfer of said notes

to the plaintiff the plaintiff had notice and knowledge that the consideration of the notes was the said contract of the irrigation company to furnish water and of the insolvency of said company, and of its inability to furnish water thereunder, and of the failure of consideration of said notes, and of the fact that the irrigation company had not, could not, and would not carry out its said contract with defendant, or any part thereof, "and that it did not intend to deliver any of said water to this defendant."

It is also alleged that defendant did not discover the true condition of the irrigation company nor its inability to furnish water and comply with its contract, and that its said representations were false and made with intent to defraud defendant, "until after said promissory notes had been assigned to plaintiff; and defendant made such discovery on or about the month of November, 1893, and not before said month."

525 It is also alleged that at and before the time of said transfer of said notes said certificates had become, and ever since have been, worthless and of no value, and that "defendant received and retains nothing of value given to defendant in consideration of the execution of said promissory notes."

It is further alleged that said notes were assigned to plaintiff as collateral security for a pre-existing debt, and not upon any new or other consideration, and that at the time of the transfer plaintiff already held other security for said debt in amount and value far exceeding said debt; that on the — day of November, 1893, a receiver was duly appointed of all the property of said irrigation company, and its said property has ever since been in the hands of receivers, and that said company is insolvent.

Defendant further alleges "that it has heretofore demanded" of the irrigation company the delivery of water under said contract, and has also about the middle of April, 1894, and again about the middle of April, 1895, made a like demand upon the receivers of said company, and has offered to pay the interest due on said notes, and the semi-annual payments required by said contract to be paid when the water should be delivered, and has made the like offer to the plaintiff.

The demurrer is general and special, the latter that the answer is ambiguous, and that it is uncertain in particulars therein stated.

The principal questions discussed by counsel for the respective parties may be grouped and considered under two propositions which may be interrogatively stated thus: 1. Would the matters pleaded in the answer constitute a defense if this action had been

brought by the Bear Valley Irrigation Company, the payee of the notes in suit; 2. If so, were the notes in suit transferred to the plaintiff under such circumstances, and for such circumstances, as makes that defense available to the defendant in this action which is prosecuted by the transferee?

1. The first of these interrogations should be answered in the affirmative. The failure of the irrigation company to furnish water upon demand put it in default, and that default occurred before suit brought.

⁵²⁶ It is true, as stated by respondent, that the agreement of the irrigation company to furnish water upon demand, and the agreement of the defendant to pay the notes and the interest thereon at specified dates, were not concurrent or dependent, and hence an action might lie for accrued interest before the water company was required to do any act.

But if before suit brought to recover such installment of interest the plaintiff made default in the performance of an act required to be performed by the conditions of its contract, as here, the delivery of water upon demand, the plaintiff must treat all the preceding agreements of the defendant, which remain unperformed, as concurrent, since he cannot enforce the performance of defendant's part of a contract while he is in default in the performance of his part of it: *McCroskey v. Ladd*, 96 Cal. 455. The answer alleges that at dates prior to the commencement of this action the defendant demanded the delivery of water under said contract of the receiver of the property of the irrigation company, and that the receiver did not deliver the water, but admitted his inability to deliver the quantity required or any part of it. It is alleged, also, that defendant "has heretofore demanded" of the irrigation company the delivery of water under said contract, and received the like reply, but the date of that demand is not given. These demands, it is alleged, were accompanied with an offer to pay all accrued interest, and to make the semi-annual payments required by the certificate.

The receiver, it is true, was not bound to perform any of the contracts of the irrigation company unless it appeared to be to the interest of the creditors, or unless required to do so by the order of the court; but nevertheless the demand was proper, since he might perform it if there was sufficient water for the purpose, and was the only person who could perform it, since the possession and control of the property had passed out of the hands of the irrigation company. The business of the irrigation company is alleged to be that of selling and supplying

water to parties owning land requiring irrigation, and it therefore appears that it was to the interest of creditors that the receiver should deliver the water if he had it.

⁵²⁷ This inability, or refusal, to furnish water when required by the terms of the contract is a failure of the consideration upon which the notes were executed.

But it is contended by respondent that to avail itself of this defense the defendant should have rescinded the contract; that defendant alleges a discovery of the fraudulent representations which induced the contract as early as November, 1893, but continued to make demands for water for two or three years thereafter with no attempt at rescission; that in order to rescind, the defendant must restore everything of value it has received; that though it has received no water (which was the real subject of the contract) it has not abandoned or surrendered the contract or given notice that it makes no claim under it.

If the plaintiff, the Russ Lumber and Mill Company, received the notes in the usual course of business, in good faith, without notice and for value, a notice of rescission to the irrigation company, the payee of the notes, given after the transfer, could not affect the indorsee; nor could the indorsee in such case be affected by a subsequent breach of the contract by the indorser; but if the indorsee did not so acquire the notes it must then stand in the shoes of the payee and be subject to any defenses available against the payee.

But it does not follow, as contended by respondent, that because a technical rescission has not been made, and cannot be made in this action, to which the irrigation company is not a party, that the defendant cannot avail itself of the defense of failure or want of consideration.

Practically, there is no difference in the effect upon the contract between the successful defense of a plea of want or total failure of consideration, and the successful termination of an action to rescind it. In either case, the contract is rendered incapable of enforcement, the judgment being a bar to any future action, so far at least as parties to the action, or those concluded by it, are concerned. Where the failure of consideration is total, as where nothing of value has been received by the defendant under it and the plaintiff cannot perform it, no notice of rescission is required, but the defendant may plead want or failure of consideration.

⁵²⁸ Respondent cites *Clyne v. Benicia Water Co.*, 100 Cal. 310; but the facts of that case clearly distinguish it from this.

In this case, the water agreed to be delivered was the subject of the contract. The defendant had bought it and paid for it by the execution of its promissory notes. The contract, called a water right certificate, was the evidence of the sale of the water, the water so purchased to be delivered in future years, the beginning of such delivery to be upon defendant's demand. Such demand was made and not complied with. The defendant therefore received nothing under the contract. But it is said that the certificate has not been surrendered or canceled or the irrigation company released therefrom, or any offer made to release it. This certificate gives the defendant no interest in the property of the irrigation company. It is not stock in a corporation. Whilst the water called for by it is for the use and benefit of certain lands of the defendant, it expressly provides that it is not appurtenant to any land. It further provides that it can be transferred only by its surrender, properly indorsed, and the issuance of a new certificate. Not only so, but the answer alleges that it was held by the irrigation company as collateral security for the payment of the notes, that it was pinned thereto and passed to the plaintiff with the notes. The object in requiring a party rescinding a contract to restore to the other party everything of value he has received under it is that the party to whom the restoration should be made shall not be put to an action to recover it. In this case the plea of a total failure of the consideration of the notes, if it succeeds, leaves the certificate in the hands of the irrigation company or of the plaintiff, discharged of all duty or liability to furnish water under it, and nothing more could be accomplished by its surrender if it were now in defendant's possession, or by a judgment of rescission if the defendant had brought an action for that purpose.

It is, of course, conceded that if the plaintiff acquired the notes for a valuable consideration and without notice or knowledge of any fact that would impeach them in the hands of the payee, the plaintiff would be entitled to recover, and that the defendant in such case might have a remedy against the irrigation ⁵²⁹ company upon its guaranty or for breach of the contract, and therefore the authorities cited by respondent upon these points need not be noticed.

It is contended by respondent that it does not appear that the irrigation company has at any time been without assets so that its promise was without value, or that its obligations may not be ultimately fulfilled and that it may have assets out of which its

debts may be paid or payment enforced, and therefore concludes that the failure to fulfill the contract was only partial, and that a partial failure without rescission would not be a defense.

It may be true that the irrigation company, though insolvent, has assets out of which damages for a failure to perform its contract might be collected in whole or in part, but its contract was to deliver water, not to pay money; and if it delivered no water, and had none to deliver, and were sued for damages, it would in all probability be sued for a total failure to perform its contract.

But a failure of consideration, either total or partial, may be pleaded as a defense to an action upon a promissory note, either wholly or pro tanto: See *Drew v. Towle*, 27 N. H. 424; 59 Am. Dec. 380, and numerous authorities there cited: 2 Am. & Eng. Ency. of Law, 369, and notes; *Tillotson v. Grapes*, 4 N. H. 444.

It is further contended by respondent that "the representations were respecting future acts only," and that such representations "do not, in contemplation of law, amount to a fraud," and could be neither false nor true when made.

But counsel in this contention confuse and fail to distinguish between "promises" and "representations." A mere promise to perform an act in the future is not, in a legal sense, a representation, nor does a failure to perform such promise convert it into a false representation; but if the promise is accompanied with statements of existing facts which show the ability of the promisor to perform his promise, and without which the promise would not be accepted or acted upon, such statements are denominated representations, and if falsely made are grounds of avoiding the ⁵³⁰ contract, though the thing promised to be done lies wholly in the future.

Here the defendant alleges that the irrigation company represented that it had the water which it agreed to furnish, and that it was prosperous financially. A sufficient water supply to enable it to fulfill its contracts was a representation of a material existing fact, and its prosperous financial condition not less so, since its ability to retain possession and control of its water plant gave assurance of its permanent ability to fulfill its contracts; the materiality and importance of which is shown by the further allegation that it had become insolvent, and its property had passed out of its control and into the hands of a receiver. But while a mere promise is not a "representation," a promise made with the intention of not performing it constitutes a fraud for which a contract may be rescinded or avoided.

Respondent also contends that "defendant's want of diligence and willful blindness cannot entitle it to relief; that there is no suggestion in the answer that the defendant did not at all times have within easy access the means of knowledge respecting the property of the irrigation company and its capacity to furnish water to the defendant."

It may be conceded that defendant had the opportunity of knowing, and was bound to know, that the irrigation company was engaged in the business of selling and furnishing water for irrigation and for that purpose had a plant and a water supply; but it is obvious that as to the extent of its water supply, and of its previous contracts which should be first fulfilled, the defendant would be obliged in any event to rely upon information derived from the irrigation company, and such information is contained in the alleged representation that it had the water sold to defendant after fulfilling the preferred contracts, and that it could and would supply the defendant as specified in its contract. It is true that the contract was made subject to certain prior contracts specified therein, among which was "Class A Certificate," and a contract with the north and south fork ditch companies, as to which the quantity of water was not specified, and that therefore a contingency was provided for which might interfere ⁵⁸¹ with the constant and unconditional fulfillment of its contract with the defendant; but construed in the light of its representation to the defendant, above stated, the qualification means that under unusual conditions there might temporarily, and at occasional times, be an insufficient supply of water to meet all its engagements, and certainly did not mean that defendant was to be supplied only when there was an exceptional abundance of water.

I conclude, therefore, that the answer presents facts, sufficiently alleged, to constitute a defense if the irrigation company were the plaintiff.

2. The second interrogatory I think should also be answered in the affirmative. It is alleged that the irrigation company falsely represented that it had the water to fulfill its contract with the defendant, and that it could and would furnish the water so sold; that at the time of making said representations said irrigation company did not intend to furnish said water, but made the same with the purpose and object of defrauding defendant out of the sum agreed to be paid in said promissory notes. It is then alleged as follows: "That at the time said note was transferred to plaintiff herein, plaintiff had notice and well knew that

all such agreements and representations aforesaid had been made and entered into between said Bear Valley Irrigation Company and this defendant; that no consideration had been given by said Bear Valley Irrigation Company to the defendant herein for the execution of said so-called promissory note, and that said Bear Valley Irrigation Company had not and could not deliver any of said water to the defendant, and did not deliver any of said water to the defendant, that it did not intend to deliver any of said water to the defendant."

It is also further alleged that plaintiff had knowledge and notice prior to the transfer of the notes to it that the sole consideration thereof was the agreement of the irrigation company to deliver said water to the defendant, that plaintiff had notice and knowledge of the insolvency of the irrigation company, and its inability to meet its obligations, and that it could not carry out its said contract, and of the want of consideration of said ~~and~~ notes, and also alleges that plaintiff had knowledge and notice of the failure of the consideration of said notes.

Without going more fully into the allegations of the answer upon the point of notice, we think that these allegations present a sufficient defense to require that the demurrer be overruled.

Some other questions, however, require notice. Appellant argues that the plaintiff having taken the notes as collateral security for a pre-existing indebtedness, and no consideration having passed from the irrigation company to the plaintiff, and none given by the plaintiff to the irrigation company, and no change having been made in the existing relation between the parties, the plaintiff is not a holder for value and is subject to any defense that would have been available against the payee.

Many authorities may be cited in support of this contention. There are few questions upon which there is a greater conflict in the decisions of the courts of different states.

In *Payne v. Bensley*, 8 Cal. 260, 68 Am. Dec. 318, the court, without giving any decided opinion upon the point above stated, held that receiving such security for an antecedent debt was a surrender of the right of attachment; that such right was a valuable one and a sufficient consideration. But in this case there is the further allegation that at the time of the transfer the plaintiff held other security in an amount and value exceeding the debt of the indorser, which, under the holding in *Payne v. Bensley*, 8 Cal. 260, 68 Am. Dec. 318, had already taken away the right of attachment, and hence the waiver of that right could not be a consideration for the transfer of these notes. But in

Sackett v. Johnson, 54 Cal. 109, it was said that this question cannot be considered as an open one in this state: Citing all the previous cases. In *Sackett v. Johnson*, 54 Cal. 109, it was urged by counsel that at the time of the transfer of the note, taken as collateral, the right of attachment did not exist, as the plaintiff had taken a deed of real estate as security. The question here before us, was, therefore, before the court, and must have been decided in that case.

It is alleged in the answer that at the time the notes were transferred to the plaintiff the certificate or contract of the irrigation company was attached thereto; that plaintiff had notice that the ⁵³³ said contract was the consideration of the notes, and also that at and before the transfer of the notes the irrigation company was insolvent, and that plaintiff knew of its insolvency, and knew that by reason of such insolvency it was entirely unable to carry out its contract with the defendant. These facts would clearly constitute a good defense if the action were prosecuted by the irrigation company, and if the plaintiff took the notes with notice or knowledge of facts constituting such defense it is not an indorsee in good faith, and stands in no better position than its indorser; and so of any defense which existed at the time of the transfer of which the plaintiff had notice or knowledge.

It is objected that the allegations of the answer are too vague and general and evasive. That the answer is not obnoxious to this objection I think sufficiently appears from the foregoing discussion.

I advise that the judgment appealed from be reversed.

Belcher, C., and Chipman, C., concurred.

For the reasons given in the foregoing opinion the judgment appealed from is reversed.

Harrison, J., Garoutte, J., Van Fleet, J.

Hearing in Bank denied.

Beatty, C. J., being disqualified, did not participate.

CONTRACTS—DEPENDENT AND INDEPENDENT COVENANTS.—Where promises in a contract are independent, and performance is not to be concurrent, either party may recover for breach thereof without showing performance on his part: *Gould v. Banks*, 8 Wend. 562; 24 Am. Dec. 90, and note. Where covenants are dependent, it is necessary for the plaintiff to aver and prove performance, or tender and offer to perform his part of the agreement, and demand performance by the other party of his part, to

entitle himself to an action for breach of covenants on the part of the defendant; *Robinson v. Harbour*, 42 Miss. 795; 97 Am. Dec. 501, where the rules for determining whether covenants are dependent or independent are stated. See *Todd v. Summers*, 2 Gratt. 167; 44 Am. Dec. 379; *Obermyer v. Nichols*, 6 Binn. 159; 6 Am. Dec. 439; *Lunn v. Gage*, 37 Ill. 19; 87 Am. Dec. 233.

CONTRACTS—RESCISSION.—As to how and within what time one must exercise his right to rescind a contract, see monographic note to *Bryant v. Isburgh*, 74 Am. Dec. 657-662, and monographic note to *Johnson v. Evans*, 50 Am. Dec. 672-681.

NEGOTIABLE INSTRUMENTS—FAILURE OF CONSIDERATION—RIGHT OF RECOVERY—BONA FIDE HOLDERS.—If the consideration of a note falls in part only, there may be a recovery by the holder for the part as to which the consideration has not failed: *Mader v. Cool*, 14 Ind. App. 299; 56 Am. St. Rep. 304, and note; *Drew v. Towle*, 27 N. H. 412; 59 Am. Dec. 380, and note. An agreement made at the time of the execution of a note, and forming its real consideration, is a part of the same contract, and between the original parties, the note cannot be enforced until the agreement is performed, and a purchaser of the note before maturity, and before the time of the agreement, with knowledge of its relation to the note, is bound by it the same as if it were attached to the note or written upon the same piece of paper: *Sutton v. Beckwith*, 68 Mich. 303; 13 Am. St. Rep. 344. But as against a purchaser without notice the rule is different: *Miller v. Ottaway*, 81 Mich. 196; 21 Am. St. Rep. 513, and note. Failure of consideration is no defense, though the assignee took with notice of the consideration of the note: *Splivallo v. Patten*, 38 Cal. 138; 99 Am. Dec. 358.

NEGOTIABLE INSTRUMENTS—COLLATERAL SECURITY FOR PRE-EXISTING DEBT—RIGHTS OF HOLDERS.—As to whether one who takes negotiable paper before maturity as security for pre-existing indebtedness is to be regarded as a bona fide holder for value, or as a transferee without consideration who takes subject to equities, the cases are in conflict: Note to *Loewen v. Forsee*, 59 Am. St. Rep. 498. That he is a purchaser for value to the extent of the original debt and to that extent unaffected by equities: *Yellowstone Nat. Bank v. Gagnon*, 19 Mont. 402; 61 Am. St. Rep. 520, and note. See, also, *Rosemond v. Graham*, 54 Minn. 323; 40 Am. St. Rep. 336, and note; *Vann v. Marbury*, 100 Ala. 438; 46 Am. St. Rep. 70, and note.

MATTER OF BANE.

[120 CALIFORNIA, 533.]

A GUARDIAN LOANING THE MONEYS OF HIS WARDS, and taking notes and mortgages therefor in his own name, thereby unnecessarily and willfully mingles the trust property with his own, and becomes liable for its safety in all events, and is not, in his accounts, entitled to be credited with the amounts so loaned.

James F. Peck, for the appellants.

V. G. Frost, for the respondent.

534 **CHIPMAN, C.** Jacob Gardner, Jr., was duly appointed guardian of the estates of John H. and Edna L. Bane, minors, in

March, 1892. There came into his hands as such guardian \$2,722.48. Upon the 18th of March, 1897, he was ordered by the court to render an account of his guardianship, which order was complied with. John H. Bane, having come of age, filed objections to certain items of the account. Upon the hearing the court approved and settled the account as rendered, except as to an item of \$25, which was reduced to \$20. No finding of fact or conclusions of law were filed or signed by the court, nor were findings waived.

The appeal is from the judgment or order settling the account and is presented by bill of exceptions. It appears that on May 14, 1892, the guardian loaned to Laura Blackwell, who was the mother of the minor children, the sum of \$500, taking her promissory note at eight per cent interest, secured by mortgage on eighty acres of land in Merced county; and on November 15, 1892, he loaned to M. J. Blackwell, husband of Laura Blackwell, \$1,600 at ten per cent interest, secured by mortgage on three hundred and twenty acres of land in Fresno county. The notes were payable three years after date, and the mortgage provided that if there was default in the payment of interest the mortgagee had the option to deem the notes due and foreclose at once. The notes and mortgages were taken in the individual name of Jacob Gardner, Jr., as payee and mortgagee, and no part of principal or interest has been paid.

It is in evidence that the guardian consulted his bondsmen about making the loans, and one of them advised it; that the loans were made for the benefit of the wards, and there was no intention on the part of the guardian to profit himself in any way by the loans; that the lands mortgaged to secure the \$1,600 note were at the time worth \$1,920, and were situated near lands owned by the bondsman who advised the loan and was familiar with land values at that place; that by reason of depreciation in values, caused by "the prevailing depression and hard times," the three hundred and twenty acre tract had fallen in value to \$800; that the guardian began foreclosure proceedings on this note early in 1897, and as reason for not doing so sooner he testified: "I did not foreclose the mortgage after the land declined to its present value [which was in 1894] because I believed the financial depression pervading the county would cease, times grow better, and the land in consequence increase in value. In this I have been disappointed." As to the eighty-acre tract the evidence is that it is still of the value of \$800 and was a good and ample security at the time the account was filed. It is in evi-

dence that M. J. Blackwell has removed to the state of Nevada, and that, so far as the guardian knows, neither of the mortgagors has any property except the mortgaged premises, but there is no evidence of the insolvency of either of them beyond the fact just stated.

1. Appellant claims that the fact alone that the guardian took ⁵³⁸ the notes and mortgages in his individual name precludes the court from treating the loans as made for the wards, and that the transaction must be treated as shown upon its face, and the sum thus invested cannot be credited on the guardian's account; that the notes and mortgages having been taken in the individual name of Gardner, he thereby mingled the trust funds with his own and may be charged with a devastavit at the election of the cestui que trust: Citing numerous cases and also section 2236 of the Civil Code, which provides: "A trustee who willfully and unnecessarily mingles the trust property with his own, so as to constitute himself in appearance its absolute owner, is liable for its safety in all events." Citing, also, *In re Arguello*, 97 Cal. 196. It was distinctly held in *In re Arguello*, 97 Cal. 196, that an administrator who deposits funds of the estate in a bank in his own name, without any designation or indication of his representative capacity, is personally liable for the loss of the deposit resulting from a failure of the bank. The good faith or intention of the administrator in making the deposit in his own name, and the fact that he had no other account in the bank, and that the bank at the time was of good credit, were held to be in no way involved in the question of his liability. It is claimed by respondent that "the doctrine laid down in the *Arguello* case is overruled by this court in the case of *Estate of Cousins*, 111 Cal. 441, in so far as it may apply to the facts of this case." In the *Arguello* case and *Estate of Cousins*, 111 Cal. 441, and the case now before us, the good faith and honest purpose of the trustee were not questioned, nor is the fact disputed that the trustee intended that the cestuis que trust should have the benefit of the transaction and that it was made for their benefit. In each case the trustee made the investment in his individual name without in any way indicating that the cestuis que trust had any interest whatever in the investment.

In *Estate of Cousins*, 111 Cal. 441, the guardian conceded his liability for the amount lost in taking the note and mortgage, but contested only the item of interest on that amount, and all that this court decided in that case was that he was not liable for interest. In discussing the principle involved, the court

made no ⁵³⁷ reference to the Arguello case, and we think did not intend to overrule the principle upon which that case rests. A careful review of the cases fails to show any difference in principle where the trustee deposits money to his individual credit and where he invests by note and mortgage in his individual name.

It is stated in a note in Hare & Wallace's Leading Cases in Equity, volume 3, third American edition, top page 475, that "all the cases seem to agree, and there can be no doubt, on principle, that a trustee or executor who makes an investment or deposits money in his own name, without designating or describing it in some way as the property of the trust, will be responsible for any loss which may occur subsequently, because he would be otherwise able to play fast and loose with his cestuis que trust, and throw the hazards of his own business on them, by designating the fund in which the loss has fallen as theirs, whether it was or was not so in reality."

It was said in *Naltner v. Dolan*, 108 Ind. 500, 58 Am. Rep. 61: "The authorities agree that a trustee who either invests or deposits trust money in his own name, without in some way designating it as trust property, will be responsible for any loss that may occur to the fund which is so invested."

It has been held to be a mingling of a trust with private funds where a trustee acts in his own name and private capacity when taking real estate security for the loan of trust money. Such conduct is held to be highly reprehensible and as not only unjust to the cestuis que trust, but as detrimental to the public weal; and it has received most emphatic denunciations both in the English and American courts.

We think the provisions of our Civil Code, *supra*, must be held to apply to such a case as the one before us. The words "trust property" are broad enough to include land as well as moneys. To willfully and unnecessarily take the title to real property belonging to the trust in the individual name of the trustee, or to thus take a note with a mortgage as security for money belonging to the trust, "so as to constitute himself in appearance its absolute owner," would, in our opinion, amount in law to mingling the trust property with his own, and the trustee would become "liable for its safety in all events."

⁵³⁸ There is no pretense here that the guardian was under any necessity to take the note and mortgage in his individual capacity; there is no evidence that he ever reported the loan to the court or asked its approval, and he filed no account of his

administration until upon the order of the court he made the one now presented. We think that, under well-settled principles governing the relations of trustees and their beneficiaries, it was error to approve and allow these two contested items.

This view of the matter makes it unnecessary to consider the remaining points presented by appellant. It is recommended that the order settling the guardian's account be reversed and the cause remanded for further proceedings.

Searls, C., and Belcher, Co., concurred.

For the reasons given in the foregoing opinion, the order settling the guardian's account is reversed and the cause remanded for further proceedings.

Harrison, J., Garoutte, J., Van Fleet, J.

GUARDIAN AND WARD—LENDING WARD'S MONEY.—A guardian taking a note payable to himself individually, without a designation of his official character, cannot be admitted to show, on the failure of the debtor, that it was taken for the funds of his ward: *Knowlton v. Bradley*, 17 N. H. 458; 43 Am. Dec. 609. If he deposits money of his ward in his own name in a bank, or takes a note for money due his ward payable to himself, he thereby converts the money, and if it is lost he must pay it himself: See monographic note to *Fessenden v. Jones*. 75 Am. Dec. 449; *Draper v. Joiner*, 9 Humph. 612; 49 Am. Dec. 719, and note. A guardian who accepts as part of his ward's estate a note payable to a preceding guardian individually takes it at his own risk; *State v. Greensdale*, 106 Ind. 264; 55 Am. Rep. 753.

PEOPLE v. HOUGH.

[120 CALIFORNIA, 538.]

SEDUCTION—WILLINGNESS TO MARRY AS A DEFENSE.—One who, under promise of marriage, seduces an unmarried woman of previous chaste character, is not entitled to be acquitted of his crime on proving his willingness to marry her at all times prior to the filing of the information or indictment against him. She is not compelled to condone his offense by marrying him, though if she did so, he would be freed from the penalty of the law.

William H. Webb, for the appellant.

W. F. Fitzgerald, attorney general, and C. N. Post, deputy attorney general, for the respondent.

GAROUTTE, J. Appellant has been convicted of a felony, charged by the information to have consisted in the seduction of an unmarried female of previous chaste character, under promise of marriage.

Section 268 of the Penal Code provides: "Every person who, under promise of marriage, seduces and has sexual intercourse with an unmarried female of previous chaste character is punishable," et cetera. Section 269 declares that a marriage of the parties prior to the filing of an information or the finding of an indictment for such offense is a bar to the prosecution thereof. The defendant asked the court to instruct the jury that the verdict should be "not guilty," if defendant at all times prior to the filing of the information was ready and willing to marry the prosecuting witness, and that his failure to so marry was by reason of her refusal. This instruction was properly refused. When a man induces an unmarried female of previous chaste character to submit her person to him by reason of a promise of marriage upon his part, the seduction has taken place—the crime has been committed. The succeeding section, which provides that the marriage is a bar to a prosecution, clearly recognizes that the crime has been committed when the promise has been made and the intercourse thereunder has taken place. There may be incidental references in some cases indicating that a refusal upon the part of the man to carry out the promise is a necessary element of the offense: *People v. Samonset*, 97 Cal. 448; *State v. Adams*, 25 Or. 172; 42 Am. St. Rep. 790. But such is not the fact. The ⁵⁴⁰ statute which provides that marriage of the parties shall be a bar to a prosecution is a most wise and just provision. Yet the woman is not compelled to condone the offense by marrying the man, and thus freeing him from the penalties of the law. Upon the seduction her affection for him may change to hatred; or thereafter her belief as to his good character may be displaced by knowledge that he is a felon. Indeed, whether or not the reasons which actuate her in refusing to marry him are good or bad is of no moment. She is the sole arbiter upon that question, and the man takes those chances when he obtains his pleasures under the circumstances here presented. It does not lie in his power to escape the penalties of the law by reason of his willingness to carry out his marriage promise. The woman has the power and the right to decline the marriage, and when she has so declined, the road to his successful prosecution is free and unobstructed. In declaring the evidence necessary to justify a conviction in a case similar to the one at bar, it was said in *People v. Krusick*, 93 Cal. 77: "In order to convict the defendant of the crime defined in this section, it is necessary for the state to prove that the person seduced was an unmarried female of previous chaste character, and that

she consented to sexual intercourse with the defendant upon the sole consideration of his promise to marry her. Unless all of these elements are established by competent evidence, the crime is not proved."

The evidence in the present case tending to prove the offense rests solely upon the testimony of the prosecuting witness. The intercourse is a matter conceded, but the promise of marriage is denied. The evidence established the female to be of previous chaste character, and also the fact of intercourse. These things most probably had great weight with the jury in testing the probability of the truth of the respective statements made by the two parties upon the witness stand. Under any circumstances, the evidence was sufficient to justify the submission of the case to the jury, and it was for the jury alone to weigh it and declare the result. The appellate jurisdiction of this court in criminal cases rests in matters of law alone, and the sufficiency of this evidence presents a pure question of fact.

⁵⁴¹ There are many exceptions taken to the various rulings of the court in the admission and rejection of evidence. We have examined them all, and find no substantial merit in them.

Upon the record presented there is no ground for a new trial. Judgment and order affirmed.

Van Fleet, J., and Harrison, J., concurred.

SEDUCTION—WILLINGNESS TO MARRY AS A DEFENSE.—The gist of the offense of seduction is the promise of the defendant to marry the prosecutrix and the yielding by her of her virtue in consequence of such promise: *McCullar v. State*, 36 Tex. Crim. Rep. 213; 61 Am. St. Rep. 847, and note. Up to the moment of conviction the defendant may make an offer in good faith to marry the prosecutrix. If such offer is declined by her, he is entitled to a dismissal of the charge under a statute which provides that if the parties marry each other at any time before the conviction of the defendant, or if he in good faith offers to marry the female seduced, no prosecution shall take place, or, if begun, shall be dismissed: *Wright v. State*, 31 Tex. Crim. Rep. 354; 37 Am. St. Rep. 822, and note. See the monographic note to *State v. Carron*, 87 Am. Dec. 405-411, on seduction as a criminal offense.

LISENBY v. NEWTON.

[120 CALIFORNIA, 571.]

AN ASSIGNEE OF A CONTRACT FOR THE PURCHASE OF LAND is not personally liable for the unpaid purchase price, though the contract of sale and purchase provides that its stipulations shall apply to, and bind, the heirs, executors, administrators, and assigns of the respective parties. The covenant on the part of the purchaser is personal, and hence the assignee cannot be charged with its performance.

George B. Graham, for the appellant.

Horace L. Smith, for the respondents.

572 BRITT, C. Prettyman Barr, the plaintiff's intestate, entered into a written contract with defendant Newton whereby Barr agreed to sell, and Newton agreed to buy, a certain tract of land, Newton promising to pay the stipulated price and interest thereon within two years from the date of the contract, and Barr covenanting to convey the land to Newton or his assigns on receiving such payment. The contract contained a provision that the stipulations thereof "are to apply to and bind the heirs, executors, administrators, and assigns of the respective parties." Afterward, in consideration of a sum of money to him paid by defendant Sharples, said Newton assigned all his right, title, and interest in and to the contract, and the premises which were the subject thereof, to said Sharples. In virtue of such assignment, Sharples took possession of the land and made certain payments to Barr of principal and interest on account of the contract price. Plaintiff brought this suit on said contract against both Newton and Sharples. The superior court rendered a decree ascertaining the amount of purchase money due from defendant Newton and ordering the sale of the land to raise such amount, with costs, et cetera, but directing also that no personal judgment for deficiency be taken against Sharples. Plaintiff contends on appeal that Sharples was personally responsible for the purchase money and interest.

Of course, no assignee of the purchaser in an executory contract for the sale of real estate can require the vendor to convey unless the purchase money be paid, but this conditional right to a conveyance is quite a different thing from personal liability to compulsory payment at the suit of the vendor; such liability can result only from some express or implied contract of the assignee, and is not implied from the mere assignment of the original contract, although followed by possession of the land. There are authorities which deny that a covenant can in any case run with an equity, or without a legal estate in the land; we need not inquire what limitations attend the principle, for it 573 is clear that the promise to pay the agreed price in a contract for the purchase of real estate is not of itself a covenant accompanying the equitable interests of the purchaser into the hands of his assignee: *Champion v. Brown*, 6 Johns. Ch. 398; 10 Am. Dec. 343; Civ. Code, sec. 1461, et seq; see *Fresno etc. Co. v. Rowell*, 80 Cal. 114; 13 Am. St. Rep. 112. Hence, if Sharples

is liable at all in this action, it must be in consequence of the clause of the contract which in terms extends the obligations of the instrument to the assigns of the parties; but since the promise to pay was only the personal covenant of the promisor, the attempt to include in its force the assigns of the vendee is inoperative; it was not competent for the parties in this manner to create a contract for such assigns. Such is the ancient rule of the common law; thus, it is said in the Touchstone: "In some cases an assignee shall be charged though he be not named, and in some cases shall not be charged though he be named, and in some cases he shall be charged when he is named. . . . And if the covenant be to do a thing merely collateral; in that case it will not bind the assignees albeit they be named expressly. Also when a contract is personal only, and a man doth bind himself and his assigns, his assigns shall not be bound hereby" (pp. 178, 179). And in Sir Edward Coke's report of Spencer's case, 5 Coke, 16 a, we are informed that: "It was resolved . . . if a man demises a house and land for years, with a stock or sum of money rendering rent, and the lessee covenants for him, his executors, administrators, and assigns, to deliver the stock of sum of money at the end of the term, yet the assignee shall not be charged with this covenant; for although the rent reserved was increased in respect of the stock or sum, yet the rent did not issue out of the stock or sum, but out of the land only; and, therefore, as to the stock or sum, the covenant is personal and shall bind the covenantor, his executors and administrators and not his assignee.' The illustrious reporter remarked further: "Observe, reader, your old books, for they are the fountains out of which these resolutions issue." Equally, in the case before us, the covenant is to pay a sum in gross not issuing out of the land, and not for its benefit or protection; in other words, it is a personal and not a real covenant, and possesses no transitive quality: See 1 Smith's Leading Cases, 6th Am. ed., 158, 162, 211.

⁵⁷⁴ By the assignment from Newton to Sharples it may be that as between them Sharples became impliedly bound to protect his assignor against the demands of the vendor on the contract; Cutting Packing Co. v. Packers' Exchange, 86 Cal. 574; 21 Am. St. Rep. 63; but that is no concern of the plaintiff; such an obligation (if it arose) did not spring from a contract expressly made for the vendor's benefit, and he cannot take advantage of it: Civ. Code, sec. 1559; Chung Kee v. Davidson, 73 Cal. 522. Section 1589 of the Civil Code, cited by appellant,

is not involved here: *Stone v. Owens*, 105 Cal. 292. The judgment should be affirmed.

Belcher, C., and Chipman, C., concurred.

For the reasons given in the foregoing opinion the judgment is affirmed. McFarland, J., Temple, J., Henshaw, J.

Hearing in Bank denied.

ASSIGNMENT OF CONTRACT TO PURCHASE—LIABILITIES OF ASSIGNEE.—If a contract for the purchase of property is assigned by the vendee, but the vendor refuses to accept the assignee as his debtor or to release the original vendee, the assignment, nevertheless, transfers to the assignee the duty to receive the property from his assignor, and to make payment therefor according to the terms of the original contract of sale: *Cutting Packing Co. v. Packers' Exchange*, 86 Cal. 574; 21 Am. St. Rep. 63. Forfeiture of a contract for the purchase of land as to the assignee thereof cannot affect the right of his assignor to enforce it: *McClintock v. South Penn. Oil Co.*, 146 Pa. St. 144; 28 Am. St. Rep. 785. See *McQueen v. Chouteau*, 20 Mo. 222; 64 Am. Dec. 178.

CHEMICAL NATIONAL BANK v. HAVERMALE.

[120 CALIFORNIA, 601.]

CORPORATIONS—PURCHASE BY ONE OF STOCK IN ANOTHER.—A national bank has no power to purchase or subscribe for stock in another corporation, though it may accept such stock as collateral security for a loan, and by the enforcement of its rights as pledgee, become the owner thereof.

CORPORATIONS—LIABILITY OF ONE AS STOCKHOLDER IN ANOTHER.—The act of a national bank in acquiring stock in another corporation is ultra vires, and cannot create any liability against such bank in favor of a creditor of such other corporation, nor can such liability result from the reception of dividends on such stock. A contract ultra vires cannot be ratified.

CORPORATIONS—EVIDENCE TO PROVE OWNERSHIP BY OF STOCK IN ANOTHER CORPORATION.—Where a corporation has no power to acquire stock in another corporation except as the result of accepting it as a pledge for a loan, and then foreclosing the pledge, a finding that it has become the owner of such stock is not supported by evidence merely showing the reception by it of dividends thereon. Though the evidence shows that the corporation sought to acquire title to such stock and was intended to be vested with such title, this is not sufficient. It must further be proved that the stock was acquired in some mode in which the corporation was authorized to acquire it.

CORPORATIONS—ULTRA VIRES.—ONE CORPORATION IS NOT ESTOPPED, when sued as a stockholder in another, from urging that it had not power to become such stockholder by subscribing for, or purchasing, the stock in question, though it had undertaken to do so and had received dividends thereon.

James E. Wadham and Frederic W. Stearns, for the appellant.

Parrish & Mossholder, for the respondent.

HAYNES, C. On September 15, 1891, the defendant, the California Savings Bank, issued to J. W. Collins, a certificate of deposit for the sum of five thousand two hundred and twenty-five dollars, payable four months after date, and said certificate was afterward, and before its maturity, sold, indorsed, and delivered to the plaintiff for value in the usual course of business. On November 12, 1891, said savings bank and said national bank, being each insolvent, closed their doors and ceased to do business. This action is prosecuted to recover from said savings bank the amount of said certificate of deposit, and to recover from the defendants Havermale and the California National Bank, as stockholders in the savings bank, their several proportions thereof. Havermale made default. Said national bank and the savings bank each answered. The cause was tried by the court without a jury, and findings and judgment were for the plaintiff, as prayed for against each respectively. This appeal is taken by the California National Bank alone, and is from the judgment and an order denying its motion for a new trial.

The motion for a new trial is based upon the insufficiency of the evidence to justify certain findings, that the court erred in its rulings upon certain questions of evidence, and that certain findings and decisions are against law.

Among the questions thus raised are the authority of the savings bank to issue certificates of deposit, and whether the certificate issued to Collins and now owned by the plaintiff was issued upon or for money deposited; but in the view we take of the case it is not necessary to consider those questions—the savings bank not having appealed—and we will therefore assume, for the purposes of this opinion, that said savings bank had such power, and that said certificate of deposit was regularly issued for money deposited by Collins, to whom it was issued and made payable, and that plaintiff had full right to recover thereon, not only against the savings bank, but also against all stockholders who are liable as such for their proportion of its debts, and consider only those ⁶⁰³ questions directly relating to the liability of the appellant, the California National Bank, as a stockholder in the savings bank.

The court found that appellant was at the time said certificate of deposit was issued the owner of fifteen hundred shares of the

capital stock of said savings bank, that two thousand five hundred shares were issued, and that appellant is liable to the plaintiff for three-fifths of the amount due from the savings bank.

The answer of the defendant, the California National Bank, the appellant here, after denying that it was at any time the owner of any of said stock, alleged: "That if any of the stock of the said California Savings Bank was ever issued to this defendant it was issued without authority from it, and without authority of law, and that the same was issued without the knowledge or consent of this defendant. Defendant alleges that it has never acquired in the usual course of business, or now has, as owner or otherwise, any stock of the said defendant, the California Savings Bank."

That appellant is, and at all the times mentioned in the complaint was, a national bank duly incorporated under the laws of the United States, is distinctly alleged in the complaint; and therefore the question as to the power of appellant to subscribe for, purchase, or own shares in said savings bank is one that must be determined from the statutes of the United States, and as to the construction of those statutes in that regard we must look to the supreme court of the United States, just as that court looks to the decisions of this court for the construction given to our own statutes where no federal question is involved.

The case of *Kennedy v. California Sav. Bank*, 101 Cal. 495, 40 Am. St. Rep. 69, involved the same questions that arise here. That case was against the same savings bank, and the California National Bank was made a defendant, as here, for the purpose of enforcing its alleged liability as a stockholder in the savings bank. The plaintiff had judgment, and the California National Bank appealed, and this court affirmed the judgment. The national bank thereupon took the case to the supreme court of the United States upon writ of error, and that court reversed the judgment.

It was there held that national banks had no power to purchase or subscribe for the stock of another corporation, though it was ⁶⁰⁴conceded that, "as incidental to the power to loan money on personal security, a bank may, in the usual course of doing such business, accept stock of another corporation as collateral and by the enforcement of its rights as pledgee it may become the owner of the collateral, and be subject to liability as other stockholders: *Germania Nat. Bank v. Case*, 99 U. S. 628. So, also, a national bank may be conceded to possess the incidental power of accepting in good faith stock of another corporation

as security for a previous indebtedness. It is clear, however, that a national bank has no power to deal in stocks."

It was further held that dealing in stocks of another corporation is an ultra vires act, and that stock so acquired creates no liability to the creditors of the corporation whose stock was attempted to be transferred, and that the bank may urge such want of power to defeat an attempt to enforce against it the liability of a stockholder. That court, quoting from *Central Transp. Co. v. Pullman Palace Car Co.*, 139 U. S. 59, 60, further said: "A contract of a corporation which is ultra vires in the proper sense (that is to say, outside the object of its creation as defined in the law of its organization, and therefore beyond the powers conferred upon it by the legislature) is not voidable only but wholly void and of no legal effect. The objection to the contract is not merely that the corporation ought not to have made it, but that it could not make it. The contract cannot be ratified by either party, because it could not have been authorized by either. No performance on either side can give the unlawful contract any validity, or be the foundation of any right of action upon it."

In the *Kennedy* case, as here, it was shown that dividends had been paid by the savings bank to appellant—in this case on fifteen hundred shares—but it was held by the supreme court of the United States that appellant is not thereby estopped from questioning its ownership and consequent liability, and that such claim "is but a reiteration of the contention that the acquiring of stock by the bank, under the circumstances disclosed, was not void, but merely voidable. It would be a contradiction in terms to assert that there was a total want of power by any act to assume the liability, and yet to say that by a particular act the ^{same} liability resulted. The transaction, being absolutely void, could not be confirmed or ratified," and could not be enforced, or rendered enforceable, by the application of the doctrine of estoppel: See, also, *Knowles v. Sandercock*, 107 Cal. 629, 642.

It is not contended by respondent that any stock of the savings bank was acquired or held by appellant as a pledge, or as security for a loan, or taken in payment of a debt, or in the usual course of business as a bank, though it is not directly admitted that it was not so taken or acquired; and in that lies the only distinction between this and the *Kennedy* case. There it was admitted upon the trial that the stock of the savings bank was

not "taken as security, or anything of the kind." In this case, however, the evidence shows that while a certificate for nine hundred and ninety shares was issued in the name of the bank, it fails to show that it was issued under such circumstances as to charge the bank as owner in this action. Said savings bank was incorporated in November, 1889, by J. W. Collins, D. D. Dare, William Collier, S. G. Havermale, and H. F. Norcross, with a capital stock of two hundred and fifty thousand dollars, divided into two thousand five hundred shares, and each of said incorporators subscribed for five hundred shares. Of these Collins and Dare, at least, were connected with the national bank, and were "the persons who conducted the business and ran the affairs of the bank." The business of both banks was conducted in the same room, and Collins managed the affairs of the savings bank and was at the same time cashier of the national bank. Original certificate No. 4 was issued in the name of William Collier for five hundred shares, and No. 6, for four hundred and fifty shares, was issued also in the name of Collier upon cancellation of No. 4.

Certificate No. 5 was issued in the name of Norcross for five hundred shares, and No. 8 for four hundred and fifty shares was issued in his name.

Certificate No. 10 for ninety shares was issued for parts of four and five in the name of Collins, leaving five shares each to Collier and Norcross.

On January 2, 1891, Collins surrendered certificates 6, 8, and 10, No. 6 being in the name of Collier, No. 8 in the name of ~~one~~ Norcross, and No. 10 in his own name, and took certificate No. 12 for nine hundred and ninety shares in the name of the national bank. None of the certificates that were issued in the name of Collier and Norcross, respectively, were indorsed or assigned by either, nor was any power of attorney or other authority from them produced by Collins authorizing said transfers to be made.

Prior to the issuance of said certificate for nine hundred and ninety shares to the bank on January 2, 1891, the savings bank declared and paid two dividends upon its stock, each for five per centum. Upon the first dividend there was paid to the national bank by the check of the savings bank seven hundred and fifty dollars, or five per cent on fifteen hundred shares, namely five hundred shares in the name of Collins, five hundred in the name of Collier, and five hundred in the name of Norcross.

The second dividend was also paid by check for the same amount on January 1, 1891, upon nine hundred and ninety shares in the name of the bank, and upon five shares in the name of F. T. Hill (the cashier of the savings bank), five shares in the name of Collier, and five hundred shares in the name of Collins.

The fact that Collins continued to carry in his own name the five hundred shares originally subscribed by him, and that he dealt or assumed to deal as cashier with the ninety shares, part of the Collier and Norcross certificates, and which was afterward included in the nine hundred and ninety shares issued to the bank, shows that he and not the bank owned said five hundred shares standing in his name, notwithstanding the dividends thereon were included in the seven hundred and fifty dollar check. As he was cashier, the dividend due him could readily be adjusted with the bank. The evidence of title shown upon the face of the certificate is not conclusively affected by the manner in which the dividend was paid.

The finding, therefore, that the bank was the owner of fifteen hundred shares is not justified by the evidence. Whether the national bank is liable as a stockholder upon the nine hundred and ninety shares evidenced by the certificates issued in its name remains to be considered.

It might be argued with much force that the bank could not, consistently with the facts disclosed by the evidence, have acquired ^{out} the shares subscribed for and issued in the name of Collier and Norcross, respectively, otherwise than by original subscription; that is, by procuring those subscriptions to be made for its benefit.

If those subscriptions had been made by Collier and Norcross as their own, and the bank had afterward purchased the shares so subscribed for, or had taken them as collateral security, ordinary business prudence would have required that the certificates should be assigned or indorsed in writing thereon, so that for whatever purpose they were taken the bank could avail itself of whatever benefits, rights, or interests were intended to be acquired. It does not appear, however, that the certificates of the shares subscribed for by these persons, though their names were inserted therein, were ever delivered to them, but do appear to have been presented by Collins unassigned and unindorsed; and by his direction the stub of the certificate was made to show that they were presented and surrendered for transfer by the California National Bank. Whether this evidence shows a subscrip-

tion by or for the national bank need not be decided. It certainly does not show that it acquired title to the stock in any mode by which it was authorized to acquire it, and that question was made both by pleading and by objection to evidence.

This case was tried after the judgment in the case of *Kennedy v. California Sav. Bank*, 101 Cal. 495, 40 Am. St. Rep. 69, had been affirmed by this court and the principles announced in that case were followed upon the trial of this case. It was there held that so long as the national bank held itself out as a stockholder, "it ought not to be permitted to defend against its liability as such stockholder by showing that it had become such in violation of law." It was doubtless because of that statement that the trial court ignored the issues made by the answer of appellant "that if any stock of the said California Savings Bank was ever issued to this defendant it was issued without authority from it and without authority of law, and that the same was issued without the knowledge or consent of this defendant. Defendant alleges that it has never acquired in the usual course of business, or now has, as owner or otherwise, any stock of the said defendant, the California Savings Bank."

There can be no doubt of the materiality of these issues, and to them the findings should have responded.

The fourth finding is as follows: "That at the time said certificate of deposit was issued the said defendant, S. G. Havermale, was the owner of five hundred of said shares of the capital stock of said savings bank, and said defendant, the California National Bank, was the owner of fifteen hundred of said shares of the capital stock of said savings bank."

As we have seen, the evidence does not justify this finding as to the number of shares held by the national bank, and as the basis of a conclusion of law that it is liable to the plaintiff, as a stockholder, must be construed to mean that whether it was acquired by an act ultra vires, or by an officer of the bank without authority, could not and does not affect the question of appellant's liability. This is made clear by a ruling made during the trial.

The national bank called a witness who produced the book containing the minutes of the board of directors of said national bank, and offered in evidence the minutes of a meeting of the board. The plaintiff objected, on the ground "that it does not make any difference"; and this objection was sustained and defendant excepted. The national bank then "offered to prove

by the record-book of the board of directors of the California National Bank that no authority was ever given or conferred by the board of directors to J. W. Collins, or any other officer or officers of said California National Bank, to make any subscription or subscriptions for any share or shares of the capital stock of the California Savings Bank, or to receive any money therefor."

An objection to this offer that it was incompetent, irrelevant, and immaterial was sustained, and an exception taken.

This ruling though justified by the Kennedy case in this court, must be held erroneous under the decision of the same case in the supreme court of the United States.

I think, also, for the reasons above stated, that appellant's specification that the fourth finding, so far as it relates to appellant, is against law must be sustained, inasmuch as it must be understood in order to support the judgment that the manner in which the stock was acquired is an immaterial factor in determining the liability of the bank as a stockholder; for, if the finding had been that it acquired the stock by original subscription, the finding would not have supported the judgment rendered against appellant.

For the error of the court in excluding the said offered evidence, and because of its failure to find upon the issues presented by appellant's answer, the judgment and order appealed from should be reversed.

Belcher, C., and Chipman, C., concurred.

For the reasons given in the foregoing opinion the judgment and order appealed from are reversed.

McFarland, J., Temple, J., Henshaw, J.

CORPORATIONS—PURCHASE BY ONE OF STOCK IN ANOTHER.—One corporation cannot subscribe to the capital stock of another corporation: *Denny Hotel Co. v. Schram*, 6 Wash. 134; 36 Am. St. Rep. 130; unless expressly authorized by statute: *Bank of Commerce v. Hart*, 37 Neb. 197; 40 Am. St. Rep. 479; or unless such a power can be implied from the powers expressly granted: *People v. Chicago etc. Co.*, 130 Ill. 268; 17 Am. St. Rep. 319. But no one will seriously contend that a corporation, whatever its purpose, may not acquire stock as security for, or in payment of, a debt, and, if necessary to the enforcement of the security, may acquire title thereto: See monographic note to *Denny Hotel Co. v. Schram*, 36 Am. St. Rep. 140, on the right of one corporation to acquire stock in another.

CORPORATIONS—WHEN MAY PLEAD ULTRA VIRES.—A contract ultra vires in the proper sense is wholly void, and cannot be ratified by either party. No performance on either side can

give it validity: *Marble Co. v. Harvey*, 92 Tenn. 115; 38 Am. St. Rep. 71, and note. A corporation may urge the defense of ultra vires as against its contract forbidden by statute or contrary to public policy, though it has received the benefit thereof: *Franklin Nat. Bank v. Whitehead*, 149 Ind. 560; 63 Am. St. Rep. 302. See *McNulta v. Corn Belt Bank*, 164 Ill. 427; 56 Am. St. Rep. 203, and note; and *Bedford Belt Ry. Co. v. McDonald*, 17 Ind. App. 492; 60 Am. St. Rep. 172, and note.

CASES
IN THE
SUPREME COURT
OF
COLORADO.

GERMANIA LIFE INSURANCE COMPANY v. LEWIN.

[24 COLORADO, 43.]

INSURANCE, LIFE—EVIDENCE—ADMISSIBILITY OF INQUEST.—In an action on a policy of insurance upon the life of a person, since deceased, the verdict of a coroner's jury that the deceased committed suicide is not admissible in evidence to establish that fact as a defense.

CORONER'S INQUEST—OBJECT OF.—The purpose of a coroner's inquest is merely to furnish the foundation for a criminal prosecution in case the death is shown to be felonious.

STATUTES ADOPTED FROM ANOTHER STATE—CONSTRUCTION.—In adopting a statute of a sister state, it is taken with the construction theretofore put upon it by the courts of that state, but this rule does not apply to a construction put upon the statute by the courts of that state since its adoption in this state.

WITNESSES—MATTER OF OPINION—COMPETENCY—DETERMINATION OF.—Whether a witness, called to testify to any matter of opinion, has such qualifications and knowledge as to make his testimony admissible is a preliminary question for the judge presiding at the trial, but his decision is not conclusive, if it is clearly shown to be erroneous in matter of law.

WITNESSES—EXPERTS—COMPETENCY OF, IN CASES OF POISONING BY CYANIDE OF POTASSIUM.—If a medical witness is called, as an expert, to prove, among other things, the symptoms attending a case of poisoning by cyanide of potassium, he is competent to testify, after a foundation is laid, showing that he is a regularly licensed physician, of extensive practice and experience, and has made a special study, for many years, of toxicology, although he may have had no actual experience with cases of poisoning with that particular drug.

INSURANCE, LIFE—ACTION—DIRECTION OF VERDICT. In an action upon a policy of life insurance, where the defense is that the deceased committed suicide by taking cyanide of potassium, it is reversible error for the court to direct a verdict for the plaintiff, when there is some evidence, though circumstantial, in support of the issue tendered by the insurance company.

Action upon a policy of life insurance, brought by Ross Lewin, as trustee, and the First National Bank of Denver, against the Germania Life Insurance Company, of New York city. The policy was upon the life of Jacob Boehm, for the sum of thirty thousand dollars. It was procured by him on October 23, 1891, and on November 11, 1891, he assigned and transferred it to the plaintiffs. On March 14, 1892, Boehm died at Denver, Colorado, proof of death was made, and payment of the policy demanded, which was refused. The plaintiffs then brought this action in which the company set up the defense that the deceased had committed suicide, within three years from the date of the policy, which contained a clause making it void and of no effect if the insured should, within three years from the date thereof, "die by suicide, or by his or her own hand, or in consequence of an attempt to commit suicide, or to take his or her own life, whether sane or insane at the time." It was claimed by the defense that the death of Boehm was caused by his taking cyanide of potassium. It appeared that on and prior to March 14, 1892, Boehm had been conducting an extensive business in the city of Denver, with one Steinbok, under the firm name of Boehm & Co. Upon that date both he and the firm were financially embarrassed, and the property of the firm was seized under a writ of attachment levied in favor of the First National Bank of Denver. The company, in support of the issue raised by it, alleged and proved that cyanide of potassium is a deadly poison. Boehm, shortly after the levy of the attachment, was found dead in a room at a hotel. He was lying upon a bed, flat upon his back; his shoes had been removed from his feet; his coat was off, vest unbuttoned, necktie untied, and collar loosened. In the inside vest pocket of the deceased was found about an ounce vial. There was a tumbler in the room in which there was about half a teaspoonful of liquid, which a doctor pronounced cyanide of potassium. The vial was labeled "Sol. Cyanide of Potassium," and there was evidence that the contents of both the tumbler and the bottle were the same. The head of the deceased, when examined by a physician, was thrown back at an angle of forty-five degrees; his mouth was open; his eyes were partially open; his body was still warm; and his fingernails were bluish in color. The solution in the glass was pronounced by a medical witness to be the same as that in the vial, and another witness described the contents of the vial and glass as having an odor "like bitter almonds or prussic acid." The evidence tended to show that

cyanide of potassium, placed upon the tongue or lips, would give them a brownish hue, and that the lips and tongue of the deceased were of such a hue. There were some stains upon the lips which were described as similar to that which would be produced from drinking from a glass. There were a few drops on the chin which had also discolored the skin. It was in evidence that cyanide of potassium, with syrup of lemon, would discolor the skin, making it of a brownish hue, that on March 10, 1892, Mr. Boehm procured a bottle of cyanide of potassium from Dr. Muir, his family physician; that such liquid was at the time colorless; and that Mr. Boehm was familiar with the effects of the drug. It was also shown that the prescription given by Dr. Muir to Mr. Boehm contained syrup of lemon, and there was some evidence tending to show that this compound would take on a brownish hue with the lapse of time. The body of the deceased was removed to an undertaking establishment. The testimony showed that the lips of the deceased had a garlicky odor, like cyanide of potassium, that the odor of the contents of the vial was also like that drug, and that the odor of cyanide of potassium is peculiar and unmistakable. The evidence also showed that Boehm was away at lunch, about the noon hour, when the attachment was levied, in company with two friends, one of whom was a close business and personal friend, named Adolph Schayer. While at the table Boehm, by a telephone in the room, communicated with his partner in the store, and when he returned to his friends it was noticed that he was pale and much agitated, and he expressed a desire to leave without eating, whereupon his friends said they would go with him. After leaving the restaurant, and while going toward Boehm's place of business, the evidence showed that Boehm was laboring under great excitement, and said to Schayer, "Adolph, they have got me; the sheriff is in possession of the place now." He then began muttering to himself, "My God! I didn't think George would do it." Upon being questioned as to whom he referred, he said, "Why, the First National Bank attachment." Soon after this he stopped on the sidewalk, and said, "Adolph, I want you to promise me one thing: I want you to be as good a friend to my wife as you have been to me." The company assumed the burden of proof and offered much evidence, only a part of which was admitted. When it rested, the court directed a verdict for the plaintiffs, and rendered judgment in accordance with such verdict when returned. An appeal was taken to reverse such judgment.

Williams & Whitford, Hugh Butler, and C. S. Wilson, for the appellant.

Jerome & Hood, and C. J. Hughs, Jr., for the appellees.

⁴⁹ HAYT, C. J. In reviewing the action of the district court in directing a verdict and rendering judgment for plaintiff, we are not only to consider the evidence actually received, but, also, such competent evidence as was offered and rejected. In support of the issue as to the alleged suicide of the deceased, the defendant offered in evidence the duly certified verdict of the coroner's jury. When this offer was first made, the trial judge seemed to have been of the opinion that such inquisitions were in no case admissible. After argument of counsel, the court changed its opinion in this respect, but rejected the inquisition upon the ground that it was impeached for irregularity in the proceeding by the evidence of Colonel Chivington, the coroner.

Upon this rehearing, we are of the opinion that the first impression of the trial court was correct, and that the inquisition was not admissible for the purpose of proving suicide. This view, which is in opposition to the conclusion announced upon the former hearing, is based primarily upon a more careful examination of our statutes.

For instance, with us the coroner is made a conservator of the peace, and in case of information reaching him of the violent or sudden death of any person within his jurisdiction, the cause of which is unknown, he is required to proceed and view the body and make proper inquiry in respect to the cause and manner of death, and, when such death occurs under suspicious circumstances, he is forthwith to summon a jury of six persons, citizens of the county, to appear and hold an inquest. In case the jury finds that a crime has been committed, and names the person whom the jury believes has ⁵⁰ committed the same, it is the duty of the coroner to issue a warrant to arrest such person, and take him forthwith before a justice of the peace, and, when the person charged is brought before the justice of the peace, he "shall be dealt with as a person held under a criminal complaint in the usual form," such warrant being a sufficient foundation for the proceeding before a justice, the same as an ordinary complaint under oath. Such being the substance of the statutes, we conclude that the purpose of inquisitions of this character is merely to furnish the foundation for a criminal prosecution in case the death is shown to be felonious.

It is claimed that inquisitions by coroners were admissible in evidence at common law, and hence are now admissible in jurisdictions where the common-law rule has not been changed by statutes, and the following cases are cited in support of this contention: *United States Life Ins. Co. v. Vocke*, 129 Ill. 557; *Pyle v. Pyle*, 158 Ill. 289; *Walther v. Mutual Life Ins. Co.*, 65 Cal. 417.

The English rule, however, grew out of the fact that the inquisition was a judicial proceeding, authorized by statute, and made the source of title of the king for lands escheating to the government, and hence were analogous to proceedings in rem, but this reason is without force under our system of government. Moreover, under our constitution, as originally adopted, no part of the judicial power of the state could be vested in the coroner. It is true that this constitution was amended in 1885 so as to permit the legislature to create new courts, conferring upon that body a large discretion with reference to the jurisdiction that might be given to such courts, but no attempt has since been made to confer judicial power upon coroners in this state; hence the inquest sought to be introduced in this case was extrajudicially taken, and should have been excluded under the rule laid down by Professor Greenleaf: 1 Greenleaf on Evidence, sec. 556.

It is true that a contrary conclusion has been reached in the state of Illinois, under statutes quite similar to our own, ⁵¹ but those cases were decided since the statutes were adopted here, and for this reason the rule does not prevail that, in adopting a statute of a sister state, we take it with the construction theretofore put upon it by the courts of that state. For this reason, the Illinois decisions are persuasive merely, and not controlling.

The case of *Walther v. Mutual Life Ins. Co.*, 65 Cal. 417, is hardly an authority in favor of the inquisition in this case, as in that case the plaintiff in an action upon a life insurance policy himself introduced in evidence the record of the proceeding of a coroner's jury. This record was introduced for the purpose of showing that the party had complied with the requirements of the policy as to the preliminary proofs of death, but it also showed the verdict of the coroner's jury, which was, in effect, that the insured had committed suicide, and the court held that the whole admission must be taken together, and, when so taken, were prima facie evidence of the facts stated therein, including the statement with reference to the suicide of the deceased. It does not necessarily follow, from the decision of the court, or

anything said in that opinion or in the opinion in *Insurance Co. v. Newton*, 22 Wall. 32, and upon which the California decision is based, that the inquisition would have been admitted in evidence to prove suicide if seasonable objection had been made thereto.

In case of death under suspicious circumstances, or resulting from accident, the rule permitting inquisitions to be used in evidence would result in a race and scramble to secure a favorable coroner's verdict, that would influence, and perhaps control, in case suit should be instituted against life insurance companies upon policies of insurance, and in cases of accidents occurring as the result of negligence on the part of corporations operating railways, street car lines, mining for coal or the precious metals, et cetera. Law writers, of late, have frequently animadverted upon the carelessness with which such inquests are frequently conducted, and to allow inquisitions to be used in a suit between private parties upon ⁵² a cause of action growing out of the death of the deceased, as in this case, would be to introduce an element of uncertainty into the practice which, we think, would be contrary to public policy, and pernicious in the extreme; and for these reasons we conclude, upon careful consideration, that the safer and better rule is to exclude such inquisitions: *State v. County Commrs.*, 54 Md. 426; *Goldschmidt v. Mutual Life Ins. Co.*, 102 N. Y. 486.

The appellant introduced Dr. Eskridge as an expert witness for the purpose, among other things, of proving by him the symptoms attending a case of poisoning by cyanide of potassium. Dr. Eskridge testified that he graduated from Jefferson Medical College, of Philadelphia, about nineteen years before, and that he has been regularly and constantly engaged in the practice of his profession since that time; that he was duly licensed to practice medicine under the laws of Colorado; that toxicology was a part of the medical instruction received at college, and that he had made this branch of his profession a special study for twelve or thirteen years; that he had been a lecturer and teacher in toxicology for four or five years; that he was familiar with all the authorities and had them at the time in his library; that while he had had no experience in treating a case of poisoning from cyanide of potassium he had, in his experience, treated many other cases extending over a large field; that he had had nearly one hundred cases of suicide or homicide from poisoning; that he had had, probably, eighteen cases of arsenical poisoning, some fifteen cases of opium poisoning, cases of poisoning by bella-

donna, by carbolic acid, one case of nitric acid poisoning, one case of veratria de veri poisoning, two cases of aconite poisoning, and one of bichloride of mercury, or corrosive sublimate, poisoning.

Notwithstanding the extended study and experience of Dr. Eskridge, and his admitted learning, the court refused to receive his testimony with reference to the effects of cyanide of potassium upon the human system, for the reason that he had had no actual experience with poisoning from cyanide ⁵³ of potassium. In this ruling we think the court was clearly in error. It is seldom that a witness is presented whose general competency, not only in the practice of medicine, but in toxicology, is so well established as was that of Dr. Eskridge upon the trial; and the court erred in allowing the fact that he had never attended a patient suffering from poisoning by cyanide of potassium to outweigh all other evidence of competency. New poisons are constantly being discovered by scientists, and under the rule announced by the district court, all inquiry as to the result of such new poisons upon the human system from experts would be excluded. In fact, under the rule announced, expert evidence would be excluded in all except those cases in which some of the usual and well-known poisons were resorted to. We think this rule would offer a premium to the ingenuity of criminals and others in the selection of rare and unusual poisons to destroy human life. It is entirely too technical, and not supported by reason or authority. The evidence shows that cyanide of potassium acts almost instantaneously, and that, if sufficient is administered, death follows immediately; hence, the chance of finding a physician qualified to testify under the rule announced by the district court is slight, indeed.

In some states it has been held that the decision of the trial court upon the competency of a witness to testify as an expert is conclusive; but we think the contrary rule is supported by the weight of reason and authority. It has the sanction of the supreme court of the United States, and should be followed in order that the practice in the state and national courts may be similar. In the case of *Stillwell etc. Mfg. Co. v. Phelps*, 130 U. S. 520, this rule is stated as follows: "Whether a witness, called to testify to any matter of opinion has such qualifications and knowledge as to make his testimony admissible is a preliminary question for the judge presiding at the trial; and his decision is conclusive, unless clearly shown to be erroneous in matter of law." In the case at bar, we think it is clear that the

district judge erred as to the law. The evidence of Dr. Eskridge⁵⁴ and experts similarly qualified should have been admitted.

We are of the opinion that the evidence properly admitted, and that which was offered and erroneously refused, was sufficient to entitle the defendant to have the defense of suicide submitted to the jury; and although such plea, to prevail, must be established by clear and satisfactory evidence, it may, nevertheless, be so established by circumstantial evidence. In this case we think it is clear that the court erred in directing a judgment for the plaintiff. The judgment will, therefore, be reversed and the cause remanded.

INQUEST—DUTY OF CORONER—ADMISSIBILITY OF INQUEST IN EVIDENCE.—It is the duty of a coroner to hold an inquest super visum corporis, where he has cause to suspect the deceased was feloniously destroyed, or when his death was caused by violence: *County of Lancaster v. Mishler*, 100 Pa. St. 624; 45 Am. Rep. 402. Post mortem inquisitions, made under the authority of the coroner, are admissible in evidence: *Grand Lodge etc. v. Wieting*, 168 Ill. 408; 61 Am. St. Rep. 123.

STATUTES ADOPTED FROM ANOTHER STATE—CONSTRUCTION.—The rule that when one state adopts the statute of another, it thereby adopts the construction placed on such statute by the highest court of the state from which it is taken, has no application when such construction is not placed on the statute until after its adoption: *Note to Rouse v. Donovan*, 53 Am. St. Rep. 462.

WITNESSES—EXPERTS UPON MEDICAL QUESTIONS—COMPETENCY.—A witness may be permitted to testify as an expert, when shown to be qualified by experience: *Chicago v. Seben*, 165 Ill. 371; 56 Am. St. Rep. 245. A physician may give an opinion upon a question as to which his knowledge is based on reading and study alone; and, in a case of alleged poisoning, he may testify from an examination, or from a hypothetical statement whether death resulted from poisoning: See monographic note to *Hammond v. Woodman*, 66 Am. Dec. 234, 235, on experts and their testimony. It is for the court to determine, in the first instance, whether a witness offered as an expert possesses the proper qualifications: *Thompson v. Ish*, 99 Mo. 160; 17 Am. St. Rep. 552. The competency of a witness is a question for the court: *Grand Lodge etc. v. Wieting*, 168 Ill. 408; 61 Am. St. Rep. 123, and note; and its ruling thereon is not subject to review or disturbance on appeal, unless a clear abuse of discretion is shown: *Bowdle v. Detroit St. R. R. Co.*, 103 Mich. 273; 50 Am. St. Rep. 366, and note. To render the opinion of a witness admissible as expert evidence, he must appear to have special knowledge of the subject under inquiry: *Laing v. United etc. Canal Co.*, 54 N. J. L. 576; 33 Am. St. Rep. 682.

TRIAL—DIRECTING VERDICT.—If the evidence clearly establishes the right of the plaintiff to recover, and no defense is proved, it is proper for the court to direct a verdict for the plaintiff, but not otherwise: *Note to Schuermann v. Dwelling House Ins. Co.*, 52 Am. St. Rep. 379.

HALL v. AMERICAN REFRIGERATOR TRANSIT Co.

[24 COLORADO, 291.]

TAXES—POWER OF STATE TO LEVY.—A state has an unquestionable right to tax all subjects within its jurisdiction, and this right may, in the discretion of the legislature, be exercised over all property coming temporarily within the state, whether for trade, business or convenience, unless such exercise of power conflicts with some constitutional limitation.

TAXES—PERSONAL PROPERTY.—Personal property may, for the purpose of taxation, be separated from its owner, and he may be taxed, on its account, wherever it is, though it may not be at the place of his domicile.

TAXES—INTERSTATE COMMERCE—TAXATION OF INSTRUMENTALITIES.—A state cannot interfere with interstate commerce by the imposition of a tax for the privilege of transacting such commerce, but it does have a right to tax, at their full value, all the instrumentalities, within the state, used for such commerce.

TAXES—INTERSTATE COMMERCE—REFRIGERATOR-CARS—TAXATION OF.—Refrigerator-cars, used for the transportation of perishable freight, from time to time, within a state, by a railroad company, which hires the cars from a foreign corporation, and pays for their use according to mileage, in the same way that railroad companies hire and pay for freight-cars on connecting lines of railroad, may be lawfully taxed by the state, though such cars are used for interstate commerce, and the assessment may be based upon the average number of such cars in use, during the year, in the state.

Action brought by the American Refrigerator Transit Company, the defendant in error, to have a certain tax declared null and void, and to restrain Hall, the plaintiff in error, as treasurer of Arapahoe county, from collecting such tax. As required by statute, the receiver of the Union Pacific, Denver & Gulf Railway Company reported to the state board of equalization that he had in use on the line of railway operated by him, during the year of 1894, forty-two refrigerator cars belonging to the transit company. The state board of equalization thereupon assessed the cars to the transit company at a valuation of two hundred and fifty dollars each, or a total valuation of ten thousand five hundred dollars, and distributed the assessment to the different counties, through which the line of railway upon which the cars were used extended, according to the mileage in each county respectively. Of this assessment, seven hundred and fifty dollars was distributed to Arapahoe county, whose county assessor made out a tax list based on such assessment, and delivered it to Hall, as county treasurer of Arapahoe county, with his warrant attached thereto for the collection of the sum of twenty-one dollars and sixty-three cents, being the amount of taxes so assessed

against the transit company. Hall was proceeding to collect this amount by distraint and sale of the property of the transit company when this action was brought. The cause was tried by the court upon an agreed statement of facts, which showed that the transit company was engaged in the business of furnishing refrigerator cars for the transportation of perishable products over various lines of railroads in the United States, and that the cars furnished to such receiver were only transiently present within the state from time to time, engaged for the purpose named. The nature of the material part of the constitutional and statutory provisions involved appear in the opinion. The relief prayed for was granted and the county treasurer sued out a writ of error.

Goudy & Twitchell, Byron L. Carr, attorney general, and Calvin E. Reed, assistant attorney general, for the plaintiff in error.

Garland Pollard, Percy Warner, and Charles M. Kendall, for the defendant in error.

²⁰⁰⁶ GODDARD, J. The power of the state to levy the tax in question is challenged by defendant in error upon three grounds: 1. Because the cars being only transiently present within the state from time to time, acquired no such situs within the state as is necessary to give the state jurisdiction over them for the purposes of taxation; 2. Because such taxation would amount to a regulation of interstate commerce, and thus be repugnant to the exclusive power vested in Congress to regulate such commerce; 3. Because, even if taxable within this state, no proper provision has been made by the legislature to assess and tax such property.

The first objection presents what we regard as the difficult question in the case, and its solution necessitates an inquiry as to the meaning of, and effect to be given to, the foregoing constitutional and statutory provisions. It will be seen by reference thereto that it is made the duty of the state board of equalization to assess all the property in this state owned, used, or controlled by railway companies, et cetera. And it is made the duty of the officers of such companies to furnish the state board of equalization, on or before March 15th of each year, a statement showing in detail, for the year ending on December 31st preceding "a full list of rolling stock belonging to or operated by such railway company. . . . The statement shall show the

actual proportion of the rolling stock in use on the company's road, all of which is necessary for the transportation of freight and passengers, and the operation of the road within the state, during the year for which the statement is made."

The right of a state to tax all subjects within its jurisdiction is unquestionable; and this right may, in the discretion of the legislature, be exercised over all property coming temporarily within its territory, whether for trade, business, or convenience, unless such exercise conflicts with some constitutional limitation: *Railroad Co. v. Peniston*, 18 Wall. 5; *Lane County v. Oregon*, 7 Wall. 71; *Pullman's Palace Car Co., 297 v. Pennsylvania*, 141 U. S. 18; 25 Am. & Eng. Ency. of Law, 18.

As was said in *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18, "The state, having the right, for the purposes of taxation, to tax any personal property found within its jurisdiction, without regard to the place of the owner's domicile, could tax the specific cars which at a given moment were within its borders."

It is clearly manifest that the purpose of these constitutional and statutory provisions is to subject all property owned or used by a railway or other corporation within the territorial limits of the state to taxation according to its value, regardless of the domicile of its owner, and in so doing they exercise a well-recognized function of legislation.

"For the purposes of taxation, as has been repeatedly affirmed by this court, personal property may be separated from its owner; and he may be taxed, on its account, at the place where it is, although not the place of his own domicile, and even if he is not a citizen or a resident of the state which imposes the tax": *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18.

While it is true, as stated by counsel for defendant in error, that it has been uniformly held that property merely in transit through a state acquires no situs for the purposes of taxation, and it may be further conceded that the property so in transit would not, within the letter and spirit of our legislation, acquire such situs, yet it by no means follows that the cars in question are entitled to exemption under this rule. As shown by the agreed statement of facts, these cars are more expensive than the ordinary freight-cars, and the various railway companies within the state of Colorado have not deemed it a profitable investment to build or own such cars, and therefore rely upon securing them from defendant in error, or like corporations, when needed; that it is necessary for the railroad companies operating

within the state of Colorado to have such character of cars in order to transport over their respective lines perishable freight; and ²⁹⁸ if they could not secure them when needed, it would be necessary for them to own and keep them as a part of their rolling stock. The sum and substance of which amounts to this, that such cars are a part of the necessary equipment of the different railroads using them in the state, and as essential to the transaction of their business as any other portion of their rolling stock. While it appears that said cars are not run in the state in fixed numbers or at regular times, and that certain or specific cars are only transiently in the state, yet it is shown that the average number of cars used in the course of the business aforesaid within the state during the year for which such assessment was made was equal to forty. Under these circumstances, we think the effect of our legislation is to give to the cars in question a situs for the purpose of taxation; and that they were "habitually used and employed" in the state, in the sense that these words are used in *Marye v. Baltimore etc. Ry. Co.*, 127 U. S. 117, and are assessable under the rule therein announced. Mr. Justice Matthews, who delivered the opinion of the court, in upholding the right of the state of Virginia to tax the Baltimore and Ohio Railway Company, whose situs was in Maryland, upon rolling stock used interchangeably upon the main line and branches of its road in the states of Maryland, Virginia, Pennsylvania, and states west of the Ohio river, as the necessities of the company required, said: "If the Baltimore and Ohio Railroad Company is permitted by the state of Virginia to bring into its territory and there habitually to use and employ a portion of its movable personal property, and the railroad company chooses so to do, it would certainly be competent and legitimate for the state to impose upon such property, thus used and employed, its fair share of the burdens of taxation imposed upon other similar property used in the like way by its own citizens."

The status of the cars in question was also substantially like that of those under consideration in *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18, in that there was an average number in use within the state during the period for which ²⁹⁹ the tax was levied; and we think that under the reasoning of that case, they were subject to taxation in this state.

Pickard v. Pullman etc. Car Co., 117 U. S. 34, and *Pullman etc. Car Co. v. Nolan*, 22 Fed. Rep. 276, are mainly relied on as sustaining a contrary view. While the court uses general expressions touching the question of situs that seem to sustain

the contention of defendant in error, it is to be observed that the question then under consideration was the validity of a license or privilege tax imposed upon cars employed in interstate commerce, and the language touching the situs of the property was used with reference to the right of a state to impose such a tax, and not as to its jurisdiction to impose a property tax, as in the case under consideration. In *Pullman's Palace Car Company v. Pennsylvania*, 141 U. S. 18, Mr. Justice Gray, referring to these and kindred cases, says: "Much reliance is also placed by plaintiff in error upon the cases in which this court has decided that citizens or corporations of one state cannot be taxed by another state for a license or privilege to carry on interstate or foreign commerce within its limits; but in each of those cases the tax was not upon the property employed in that business, but upon the right to carry on the business at all, and was thereby held to impose a direct burden upon the commerce itself."

It will be readily seen, therefore, that the expressions of the court in regard to the question of situs could have no significance or bearing upon that question as presented in this case. If it can be said that the court in those cases intended to hold that, under the conditions therein disclosed, the cars acquired no situs that would subject them to a property tax, then its finding was in direct conflict with the conclusion reached in the later cases above referred to.

The tax now under consideration is not a license tax, or in any sense a tax for the privilege of transacting interstate commerce, but only a property tax imposed upon certain cars employed in such commerce. The second objection urged against its validity is, therefore, clearly untenable. The power of a state to impose such a tax is too well settled to ³⁰⁰ admit of discussion. As was said by Mr. Justice Brewer, in passing upon the petition for rehearing in *Adams Exp. Co. v. Ohio*, 166 U. S. 185: "Again and again has this court affirmed the proposition that no state can interfere with interstate commerce through the imposition of a tax, by whatever name called, which is in effect a tax for the privilege of transacting such commerce; and it has as often affirmed that such restriction upon the power of a state to interfere with interstate commerce does not in the least degree abridge the right of a state to tax at their full value all the instrumentalities used for such commerce."

And as was said by Mr. Justice Gray, in *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18: "The cars of this company

within the state of Pennsylvania are employed in interstate commerce; but their being so employed does not exempt them from taxation by the state; and the state has not taxed them because of their being so employed, but because of their being within its territory and jurisdiction."

To the same effect are *Postal Tel. Cable Co. v. Adams*, 155 U. S. 688, and the original opinion, in *Adams Exp. Co. v. Ohio*, 165 U. S. 194, in which this question is fully discussed and authorities reviewed.

In the view we take touching the situs of the property, but little remains to be said upon the question presented by the third objection, since the reasons advanced in its support are mainly those relied on as sustaining the claim of defendant in error that its cars were only transiently here, and were not "used or controlled" in the state within the meaning of our statute, an assumption that we have found to be unwarranted under the agreed facts in the case. Constituting, as we have seen, a part of the necessary equipment of the railroad company using them, the cars clearly come within the class of property intended to be reached by the foregoing legislation, and consequently within the jurisdiction of the state board of equalization to assess and tax them. That the procedure prescribed furnishes a mode, convenient and equitable to all concerned, for the valuation and taxation ³⁰¹ of this class of property, is settled by prior decisions of this court: *Carlisle v. Pullman Palace Car Co.*, 8 Colo. 320; 54 Am. Rep. 553; *Denver etc. Ry. Co. v. Church*, 17 Colo. 1; 31 Am. St. Rep. 252.

And the right to base the assessment upon the average number of cars in use within the state during the year is recognized in *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18, and expressly upheld in *Marye v. Baltimore etc. Ry. Co.*, 127 U. S. 117. In the opinion quoted from, Justice Matthews says: "And such a tax might be properly assessed and collected in cases like the present where the specific and individual items of property so used and employed were not continuously the same, but were constantly changing, according to the exigencies of the business. In such cases, the tax might be fixed by an appraisement and valuation of the average amount of the property thus habitually used."

Our conclusion, therefore, is that the tax in question is not obnoxious to either of the objections urged against it, and the court below erred in restraining its collection. Its judgment is

accordingly reversed, and the cause remanded, with direction to the court below to dismiss the action.

TAXES—PROPERTY USED IN INTERSTATE COMMERCE—RAILROAD CARS.—All personal property within the state, which has acquired a situs therein, owned either by residents or nonresidents, is subject to taxation by the state, though personal property is not taxable in a state through which it is merely passing in the usual course of transportation: See monographic note to *Buck v. Miller*, 62 Am. St. Rep. 459, 470, 476, on the situs of personal property for the purpose of taxation. Property used in interstate commerce is not, on account of such use, withdrawn from the power to tax: Note to *Buck v. Miller*, 62 Am. St. Rep. 474, though a state has no power to impose a tax on interstate commerce: *McNaughton Co. v. McGirl*, 20 Mont. 124; 63 Am. St. Rep. 610. The rolling stock of a railroad company is personal property. Hence a state has a right to tax railway cars found within its boundaries, although they are engaged in interstate commerce, and, though used, are not owned by the company to which they are assessed: Note to *Buck v. Miller*, 62 Am. St. Rep. 470, showing that a state has a right to tax all personal property found within its jurisdiction, without regard to the place of the owner's domicile.

LATHROP v. TRACY.

[24 COLORADO, 382.]

APPEAL—COMPLIANCE WITH RULES OF COURT.—Alleged errors, based upon the admission or rejection of evidence, cannot be considered, though argued by counsel, where no assignment of error has been predicated thereon as required by a rule of the supreme court.

APPEAL—REVIEW OF FINDING OF FACT—CONFLICTING EVIDENCE—DEPOSITIONS.—If there is any legal and competent evidence to support a finding of fact, it is a general rule that the judgment will not be disturbed, though the evidence is conflicting. The fact that some of the evidence is in the form of depositions does not make it the duty of the court to sift the evidence to determine on which side it preponderates, where the larger and more material part of the evidence is oral testimony, and the court cannot say that the finding is wrong. The general rule, at most, is modified only as to the depositions.

TRUSTEE'S SALE—"HIGHEST AND BEST" BIDDER—WHO IS.—A requirement in a trust deed that, if a sale is made by the trustee, he must sell for the "highest and best" price, does not mean that no sale is legal unless there are three or more bids. Hence, if the deed expressly provides that the owner of a note secured thereby may become the purchaser at such a sale, and he is the only one who bids, his offer is the "highest and best" bid within the meaning of such requirement.

TRUSTEE'S SALE—COMPETITION.—If a full and fair opportunity is given to bidders, at a trustee's sale, to participate therein, and there is no collusion, the requirement as to competition is fulfilled.

TRUSTEE'S SALE—TIME—FRACTIONS OF AN HOUR.—The law does not recognize fractions of an hour. Hence, if a

trustee gives notice that he will make a sale at ten o'clock, he is not required to sell precisely at that hour, but may sell at any time during the hour, and a sale at half past ten o'clock is not a departure from the notice.

TRUSTEE'S SALE—INADEQUACY OF PRICE.—A trustee's sale, properly conducted, cannot be set aside on the ground of mere inadequacy of price.

TRUSTEE'S SALE—INADEQUACY OF PRICE.—A foreclosure sale, made by a trustee, will not be set aside merely because it results in loss to the owner of an equity in the property. It is unfortunate for him that, on account of the stringency of the times, he should lose his equity because the property does not bring its full value, but this is no reason why a court should give him a further opportunity to protect himself, when he does not even claim that another sale would enable him to do so.

Samuel H. Baker, for the appellant.

A. B. Seaman, for the appellee.

³⁸³ **CAMPBELL, J.** The object of the action—which is brought against the purchaser, at a trustee's sale, of three lots situate in the city of Denver—is to cancel the trustee's deed, as against the plaintiff, the alleged equitable owner, on the ground that the same, as to her, is invalid. The trial was to the court without a jury, whose findings of fact and law were for the defendant, resulting in the dismissal of the action. From the judgment plaintiff has appealed.

The assignments of error are three in number: 1. The ³⁸⁴ court erred in rendering and entering judgment in favor of the defendant and against the plaintiff, when, under the law and the evidence, said judgment should have been for the plaintiff; 2. The court erred in this, that the finding and judgment and each of them is against the law; 3. The court below erred in this, that the finding and judgment, and each of them, is contrary to the evidence in the case. Though separately stated, as the rule requires, they are tantamount merely to an assignment that the decree is contrary to the law and the evidence.

We premise by saying that the alleged errors of the court in admitting and rejecting testimony, argued by the appellant, cannot be considered, for no assignment of error has been predicated thereon, as required under rule 11. It is more satisfactory, however, to say that even a casual inspection of the record shows that plaintiff was not prejudiced by any such ruling of the court upon the evidence.

A brief statement of the facts at the outset will shorten the opinion, as well as more clearly bring into view the points urged for a reversal. Plaintiff was the equitable owner of these lots,

and took a conveyance thereof subject to the encumbrance of a trust deed securing the payment of a five thousand dollar note. The maker of the note being in default, the trustee, on the proper request, and under the authority conferred by the trust deed, proceeded to advertise and sell the property. At the sale it was bid in for the beneficiary at three thousand dollars, and that amount was indorsed as a credit on the note.

The plaintiff charges in her complaint that the sale was invalid because the newspaper in which appeared the advertisement of the notice of sale was not of the character contemplated by the trust deed; that the sale was not held at the time advertised, or conducted in the proper manner; that the property brought an inadequate price; that there was no competition in the bids, and no bona fide purchaser. At the trial, however, the irregularity as to the advertisement was abandoned, and the defects argued by counsel are under the other specifications.

²⁵⁵ 1. All questions of fact were determined against the appellant by the trial court, chiefly upon uncontroverted evidence, for only as to the manner of conducting the sale was the evidence at all in conflict, and that was not serious. As there was legal and competent evidence to support the finding, we might summarily dispose of this phase of the case by invoking the general rule prevailing in appellate tribunals, and refuse to disturb a judgment predicated upon such evidence, though there was a conflict therein. But the appellant contends that, inasmuch as some of the evidence was in the form of depositions, the foregoing rule is inapplicable, and that it is our duty in such a case to sift the evidence with a view to determine on which side it preponderates. By far the larger and more material part of the evidence was oral testimony by witnesses heard in the presence of the court, and so the case does not, as contended by appellant, entirely fall without this rule, but, at most, is modified only as to the depositions.

Whatever rule we adopt here, the result is the same; as we cannot say that the findings are wrong. Indeed, as we view the case, there was no real conflict except as to the tone of voice in which the trustee cried the sale, and, as to that, if credence was given to his testimony, the court was abundantly justified in finding that he did his full duty. Moreover, no claim is made by appellant's counsel that there is not some competent evidence to uphold this particular finding.

2. Upon the legal propositions correct principles were applied. There was only one bidder at the sale, the note owner

(through his agent), and the trustee's deed was made to him. It is said, therefore, that there was no competition, and the highest and best price was not secured, and there was no bona fide purchaser. Neither position is tenable. The trust deed expressly provides that the owner of the note may become the purchaser. Neither the trustee nor the owner of the note can compel other persons to bid at a sale. If, therefore, no one but the owner bids, his offer, in the ³⁸⁶ sense of the term as used in the trust deed, is the "highest and best," and where a full and fair opportunity is given to bidders to participate, and there is no collusion, the requirement as to competition is fulfilled. Where only two bids are made, one may be "higher and better" than the other, but it is not the "highest and best"—that is, if we speak with the utmost precision and accurately distinguish between the three degrees of comparison. It is only where there are three or more bids that one may be said to be the "highest and best." But where the trust deed declares the trustee must sell for the highest and best price, this does not mean that no sale is legal unless there are three or more bids. If only one bona fide bid is made, it is, in the sense of the language employed in the instrument, "the highest and best bid." The contention of the appellant to the contrary savors too much of subtlety to receive judicial sanction when contracts of the character in question are construed.

3. The sale was advertised for 10 o'clock A. M. It was about half past 10 o'clock when the bid was accepted and the property declared sold. There is no satisfactory evidence (in fact none whatever) that any person intending to bid left before the sale began, or was misled into believing that it would not occur because the trustee did not begin reading the notice at the precise minute advertised. If there was any necessity for justifying the trustee in waiting for thirty minutes, the record furnishes it in the fact that several other like sales at the same hour and place were being cried, which, as appellant's counsel upon another branch of the case contends, might tend to confuse bidders, and prevent information as to what was taking place. This act is claimed to be a departure from the notice of sale, but it is not. In the case of *McGovern v. Union Mut. Life Ins. Co.*, 109 Ill. 151, this precise question was before that court. There the property was advertised to be sold at the hour of 11 o'clock, but the sale did not occur until between half past 11 and 12 o'clock. The claim there was the same as here, that the trustee must sell the property at the precise hour advertised. ³⁸⁷ Mr. Justice

Craig, speaking for the court, so effectually disposes of this contention that we take the liberty of giving his exact language: "The law does not recognize fractions of an hour or fractions of a day, and when a notice says that a sale of land will be made at the hour of 11 o'clock, the practical common sense of the language used is, that the sale will be made during the hour of 11, or between 11 and 12 o'clock. This is upon the ground that 11 o'clock means from 11 until 12—in other words, it is 11 o'clock from 11 to 12. It would have been impossible for the trustee to have made this sale precisely at 11 o'clock. That is but an instant, and before the trustee could have read two lines of the advertisement the time would have been gone. The law does not expect or require impossible things, and a moment's reflection is enough to convince any reasonable person that the trustee, under this notice was not required to appear and sell precisely at 11 o'clock, but the notice gave him the right to appear at any time during the hour and make the sale." Approving this decision, see *Lester v. Citizens' Sav. Bank*, 17 R. I. 88.

4. The defendant offered no evidence as to the value of the property; that produced by the plaintiff is substantially harmonious. It was estimated at from seven thousand five hundred dollars to ten thousand dollars. The plaintiff's own witnesses, however, admitted that at the time of the sale, owing to the financial depression following the panic of 1893, it was almost impossible to fix any market value for lots situate as these are. There were no sales at all, except under foreclosures, and while the foregoing were the estimated values, the witnesses did not pretend to say that any such price could then have been obtained in the market.

Mere inadequacy of price is no ground for setting aside a judicial, or trustee's sale, otherwise properly conducted. There is not a particle of evidence in this record of any irregularity in the sale, unless the alleged inadequacy of price is such, ³⁸⁸ and that, of itself, is not ground for declaring the sale invalid. At best, it is only a circumstance which, taken in connection with proof of irregularity, surprise, accident, mistake, or fraud, or either or all together, sometimes leads to the setting aside of sales of this character. The very cases cited by the appellant so hold. Among others, see *Means v. Rosevear*, 42 Kan. 377; *Bixly v. Mead*, 18 Wend. 611. See, also, cases cited in 26 Am. & Eng. Ency. of Law, 952; *Loveland v. Clark*, 11 Colo. 265, which is a leading case.

But if there was some evidence of any of these infirmities, plaintiff's own conduct would be an insuperable objection to

granting relief. Neither in her pleading nor at the trial did she offer to do equity. There is no evidence at all that the property would probably bring more if resold. Plaintiff does not offer to bid more, or to bid the amount of the note, or any larger sum, or claim that any other person would be likely to do so. Nor does she offer to pay any of the costs of the former sale or the accrued interest or delinquent taxes. In fact, she admits that she was financially unable to do any of those things, or to purchase the property or bid at the sale. It may be, and doubtless is, unfortunate that she must lose her equity in this property because, on account of the stringency of the times, the property did not bring its full value. But this is no legal reason why the court should depart from the unquestioned rules of law that govern such cases and arbitrarily give to the plaintiff a further opportunity to protect herself, when even she herself does not claim that another sale would enable her to do so: *Boulder etc. Placer Co. v. Maxwell*, 24 Colo. 87; 1 Pomeroy's Equity Jurisprudence, 2d ed., sec. 393, note 4, and cases cited; *Loney v. Courtney*, 24 Neb. 580; *Massachusetts Mut. Life Ins. Co. v. Boggs*, 121 Ill. 119; *Duncan v. Dodd*, 2 Paige, 99.

The very contingency has happened in this case that frequently occurs in such circumstances. Where one buys, as a speculation, an equity in property, hoping to sell on a rising market, to clear off the prior lien and make a profit, he necessarily runs the risk of a decline in values, the loss of ³⁸⁹ the original investment, if any, and the anticipated profits. All this must have been contemplated when the purchase was made, and in the absence of some recognized equitable ground for relief, a foreclosure sale will not be set aside merely because it results in loss to the owner of the equity.

The court below, upon legal and sufficient evidence, having determined all of these questions of fact against the plaintiff, and the law being correctly applied thereto, the judgment should be affirmed, and it is so ordered.

TRUSTEE'S SALE.—INADEQUACY OF PRICE, without more, unless so gross as to shock the moral sense, or to create a presumption of fraud, is insufficient to invalidate a sale under a deed of trust: *Holdsworth v. Shannon*, 113 Mo. 508; 35 Am. St. Rep. 719; Monographic note to *Tyler v. Herring*, 19 Am. St. Rep. 293, on sales and conveyances by trustees, discussing the subject at length. A trustee's sale may be declared invalid and be vacated because the mode of sale prescribed by the trustee was not pursued, but such a sale should not be avoided for slight and trivial reasons: Note to *Tyler v. Herring*, 19 Am. St. Rep. 250.

HINDRY v. HOLT.

[24 COLORADO, 461.]

NEGLIGENCE—DEATH BY NEGLIGENCE OR WRONGFUL ACT.—A RIGHT OF ACTION FOR DAMAGES resulting from death through negligence or wrongful act does not exist unless it is expressly given by statute, as no such right is given by the common law.

NEGLIGENCE—DEATH BY NEGLIGENCE OR WRONGFUL ACT—RIGHT OF ACTION—CONSTRUCTION OF WORDS, "HEIR OR HEIRS" IN STATUTE.—In the Colorado statute, which gives a right of action for damages resulting from death through negligence or wrongful act, designates the parties who may sue, and provides that the "heir or heirs" of the deceased may sue, if there is no husband or wife, or if he or she fails to sue within one year after the death, the words "heir or heirs" mean "child or children," and do not include all those entitled to share in the estate of a person dying intestate. The right of action is, therefore, limited to lineal descendants.

NEGLIGENCE—DEATH BY NEGLIGENCE OR WRONGFUL ACT—RIGHT OF ACTION—FATHER AND MOTHER.—Under a statute giving a right of action, for damages resulting from death caused by negligence or wrongful act, to the father and mother of the deceased, or to the surviving parent, they have the exclusive right of action where the deceased had never been married and left no children.

NEGLIGENCE—DEATH BY NEGLIGENCE OR WRONGFUL ACT—RIGHT OF ACTION—NIECE.—If an unmarried man, who supports the child of a deceased brother, is killed by negligence or wrongful act, the child, though left as the decedent's only heir, has no right of action for damages under a statute limiting the right to sue, in such cases, to lineal descendants of the deceased.

Action brought on behalf of Catherine M. Holt, by her guardian ad litem, C. J. Burns, against J. B. Hindry, to recover damages for the death of Thomas Holt, her uncle, who was an unmarried man, thirty-eight years of age, and who was, on October 6, 1893, employed by the defendant as a common laborer. Holt was excavating a sewer trench, in North Denver, under Hindry's direction, and while thus engaged the ground caved in upon him, causing his death. He died intestate, leaving surviving him Catherine M. Holt, a daughter of his deceased brother, an infant, five years of age, as his only heir. Holt had almost entirely supported Catherine and her mother for nearly two years, furnishing clothing for Catherine and provisions and necessities for the family. In September, 1892, Catherine and her mother moved away from the city of Denver, and from that time until Holt's death, he continued to support Catherine, sending money to her for that purpose, and would have continued to support, educate, and maintain her if he had survived. A jury

trial resulted in a verdict and judgment for four thousand five hundred dollars, and the defendant appealed.

George W. Miller, Daniel Sayer, and John H. Reddin, for the appellant.

Caypless & Brown, for the appellee.

⁴⁰⁵ GODDARD, J. Among the many objections raised by the specifications of error, we deem it necessary to notice the one only which challenges the right of appellee to maintain the action, since, in our opinion, this question is decisive of the case. No right of action for damages resulting from death through wrongful act or negligence was given by the common law, and such right exists only by virtue of our statute: Gen. Laws 1877, p. 343; Mills' Annotated Statutes, c. 37.

This statute gives the right of action, and designates the party or parties who may sue for recovery of damages in cases of this kind, and classifies them as follows: 1. Husband or wife of deceased; 2. If there be no husband or wife, or he or she fails to sue within one year after such death, then by the heir or heirs of deceased; 3. If such ⁴⁰⁶ deceased be a minor or unmarried, then by the father or mother, who may join in the suit, and each shall have an equal interest in the judgment; or, if either of them be dead, then by the survivor.

Though similar in its general features to the original English statute (9 & 10 Victoria, c. 93) known as "Lord Campbell's act," and the statutes on this subject generally adopted in this country, it will be seen that our act differs from all of them in its designation of the parties that may sue. Most of them provide that the action may be brought by the personal representatives of the deceased, for the benefit of his widow and next of kin, while, by the terms of our statute, the right to sue is vested, in the first instance, in the surviving husband or wife to the exclusion of all others; and the existence of the right in the second class named is wholly dependent upon the fact that there be neither husband or wife surviving, or that he or she shall have waived the right by failing to sue in the time prescribed; thus evincing an intention on the part of the law-making power to confer this new right of action upon the second class, only in the event the decedent, at the time of death, was, or had been, a married person, and should leave surviving lineal descendants. This is made more manifest by the third subdivision, whereby the right of action is exclusively given to the father and mother

in case the deceased was a minor or unmarried. By construing the words "heir or heirs" as used in the second subdivision to mean "child or children," the purpose of this character of legislation is carried out, which is to compensate those who suffer pecuniary loss by reason of the death. While, on the other hand, if the words "heir or heirs" are to be construed as meaning all those who, under the statute of descents and distributions, would be entitled to inherit, then collateral kindred, however remote, who would derive no pecuniary benefit from the continuance of the life of deceased, as well as the direct descendants, may maintain the action—a result wholly inconsistent with the plain purport and object of the statute.

⁴⁶⁷ And furthermore, such construction would render the third subdivision wholly useless and unnecessary, since the father and mother would, by our act of descents and distributions, be the heirs in case the deceased was a minor or unmarried, and consequently included within the class of beneficiaries described in the second subdivision.

In order, therefore, to give consistency and effect to all of the foregoing provisions, and to carry out the beneficent purpose of the statute, the words "heir or heirs," as used in the second subdivision, must be held to be synonymous with child or children. In *Jordan v. Cincinnati etc. R. R. Co.*, 89 Ky. 40, the supreme court of Kentucky had under consideration the meaning to be given to the word "heir" as used in their statute, which provided that the "widow, heir, or personal representative" of the deceased should have the right to sue; and it was held that it should be so limited as to mean child, and not extended so as to include collateral kindred of the deceased. Lewis, chief justice, in speaking for the court, says: "The word 'heir' cannot, according to its 'peculiar and appropriate meaning in the law,' be used in relation to damages recoverable under the section, being applicable to real estate of inheritance, and not to personalty. It must, therefore, be interpreted to mean either distributee or child. To make it mean distributee would, it seems to us, be contrary to the reason and purpose of the law, which was intended to give redress, reparation, or compensation to those only who are injured pecuniarily by the loss or destruction of the life of husband and father."

To the same effect is *Henderson v. Kentucky Cent. R. R. Co.*, 86 Ky. 389; *Cincinnati etc. Ry. Co. v. Adams* (Ky., March 20, 1890). 13 S. W. Rep. 428. The case of *Denver etc. R. R. Co. v. Wilson*, 12 Colo. 20, is relied on as recognizing the right of

brothers and sisters of the deceased to maintain an action under this statute. That was an action brought by the parents to recover damages for the death of an unmarried son; and the question as to the right of collateral ⁴⁰⁸ kindred to maintain the action was in no way involved; and moreover, the language used, aside from being mere dictum, is found in a quotation from the case of *Chicago v. Keefe*, 114 Ill. 222, 55 Am. Rep. 860, cited in support of a different proposition. The case, therefore, is not an authority for the rule claimed by appellee. Our conclusion is, that the words "heir or heirs," as here used, do not include all those entitled to share in the estate of a person dying intestate, under our statute of descents and distributions, but were intended to mean "child or children" and limit the right of action to lineal descendants of the deceased. In this case the deceased had never been married, and had no children. Under such circumstances, the right of action is given, as we have seen, exclusively to the father and mother. This, in itself, precludes the plaintiff from maintaining the action. The judgment of the district court is therefore reversed, and the cause remanded, with direction to dismiss the action.

NEGLIGENCE—DEATH BY NEGLIGENCE OR WRONGFUL ACT—RIGHT OF ACTION.—Actions for negligence causing the death of a person are purely statutory, and can only be maintained in the name of the person in whom the right of action is vested by the statutes of the state where the injuries resulting in death are inflicted: *Note to Myers v. Holborn*, 55 Am. St. Rep. 608; *McDonald v. Pittsburgh etc. Ry. Co.*, 144 Ind. 459; 55 Am. St. Rep. 185. One who seeks to recover for the death of a human being must bring himself clearly within the terms of the statute authorizing such a recovery, which will be strictly construed: *McDonald v. Pittsburgh etc. Ry. Co.*, 144 Ind. 459; 55 Am. St. Rep. 185, and note showing that, at common law, a civil action does not lie for causing the death of a human being.

HOPKINS v. BURR.

[24 COLORADO, 502.]

TRUSTS—CONVERSION BY TRUSTEE—LIABILITY.—In order to subject a private estate of a defaulting trustee to the payment of a trust fund, such as the proceeds of stock sold on commission, which have been by him wrongfully converted, it is not necessary to trace such fund into any particular property, but it must be clearly shown that it went into, and was used for the benefit of such estate.

APPEAL—ABSENCE OF EVIDENCE—FINDINGS OF COURT—PRESUMPTION.—It will be presumed, on appeal, where the record does not contain the evidence, that it was sufficient to sustain the findings of the court.

Rogers, Cuthbert & Ellis, for the plaintiff in error.

Frank L. Woodward, for the defendant in error.

⁵⁰² GODDARD, J. On May 15, 1893, William R. Mygatt made an assignment, for the benefit of his creditors, to plaintiff in error, James F. Hopkins, as assignee. On August 25, 1893, Burr & Knapp, defendants in error, filed in the district court of Arapahoe county their petition, wherein they allege in substance that on March 6, 1893, they placed in Mygatt's hands (who was at that time doing business as a broker) one hundred shares of the capital stock of the Denver Consolidated Gas Company for sale; that afterward, and on March 28, 1893, Mygatt sold said stock for the sum of fifty-two dollars per share, and received therefor the sum of five thousand two hundred dollars; which sum, less twenty-six dollars, the commission of Mygatt for making the sale, to wit, five thousand one hundred and seventy-four dollars, was the property of petitioners, in which Mygatt had no interest, and that said sum constituted a trust fund, to which they alone were entitled. This sum he failed to ⁵⁰³ account for or turn over, but retained the same, and did not notify them of the sale of stock until May 5, 1893. Allege an assignment by Mygatt of all his property, for the benefit of his creditors, to Hopkins, as assignee, and aver that said sum of five thousand one hundred and seventy-four dollars, being the property of petitioners as aforesaid, was deposited by the said Mygatt to the credit of his general deposit in bank and was not paid to petitioners as it should have been prior to the making of said general assignment, and that the assigned estate in the hands of said assignee has received and still retains the benefit of said five thousand one hundred and seventy-four dollars.

On the same day, the petitioners, the assignee and Mygatt, appearing by their respective attorneys, a hearing was had on said petition. Upon the evidence introduced, the court found that the allegations of the petition were true, and ordered the assignee to pay petitioners, out of the first money coming into his hands, the said sum with interest. On October 31, 1894, the National Bank of Commerce, James Leonard, and John C. Montgomery, the other plaintiffs in error, filed their petition asking that the foregoing order be set aside. The assignee Hopkins appeared, and filed his answer to this petition, but no notice thereof was ever legally served upon the defendants in error, and no further proceedings were had thereon in the court below. On March 18, 1895, by order of the court the assignee was authorized to sue out this writ of error.

Upon the filing of the record in this court, counsel for defendants in error interposed a motion to strike out all that portion which purports to be a transcript of the proceedings had subsequent to the entry of the original judgment, which motion was overruled. But, upon a further investigation, we are led to a different conclusion, and are satisfied that these proceedings in no way affect the original judgment, and are not properly a part of the record. If, after the time that had elapsed since its rendition, the judgment could be assailed in the manner attempted, and for the reason set forth by plaintiffs in error in their petition, it was certainly incumbent ⁵⁰⁴ on them to prove the facts relied on, and have the question determined by the court below. As the matter now stands, the right to the relief sought has been neither affirmed nor denied. The only question, therefore, presented by the record properly before us is, whether the averments in the original petition are sufficient to admit of proof that the money of defendants in error was held by Mygatt in trust, and that the same passed in some form to Hopkins, under the assignment. We think they are sufficient to admit of evidence in support of both propositions. Under the circumstances alleged, the money certainly constituted a trust fund in the hands of Mygatt; and under the allegation that "the assigned estate in the hands of said assignee has received and retained the benefit thereof," it was permissible to show that either the money or the property purchased with it passed to the assignee, or that the fund or its equivalent had in some way gone into and benefited the assigned estate; and thus establish the ultimate fact as alleged.

The circumstances under which equity will follow and reclaim a trust fund that has been wrongfully converted by a trustee have been stated in former decisions of this court and of the court of appeals: *McClure v. La Plata County*, 19 Colo. 122; *Holden v. Piper*, 5 Colo. App. 71.

In *McClure v. La Plata County*, 19 Colo. 122, it is said: "That in order to subject a private estate of a defaulting trustee to the payment of the trust fund that has been by him wrongfully conveyed, while it is not necessary to trace such funds into any particular property, it must be clearly shown that it went into, and was used for the benefit of, such estate."

Under the averments of this petition, as we have seen, evidence was admissible to show that the trust fund was so used as to bring the case within this rule; and in the absence of the evidence from the record, it is to be presumed that such evidence

was introduced, and that the court below correctly found that it sustained the truth of the averments. The judgment of the court below must, therefore, be affirmed.

TRUSTS—CONVERSION—TRACING FUNDS—ELECTION OF CESTUI QUE TRUST.—If a trustee has, in fact, converted trust funds to his own use, or has, without authority, invested them in any other property into which they can be distinctly traced, the cestui que trust has an election either to follow the same into the new investment, or to hold the trustee personally liable for breach of the trust: *White v. Sherman*, 168 Ill. 589; 61 Am. St. Rep. 132.

MILLS v. HART.

[24 COLORADO, 506.]

A MOTION FOR JUDGMENT ON THE PLEADINGS, based on the facts thereby conceded, cannot be sustained, except where, under such facts, a judgment different from that pronounced could not be rendered, notwithstanding any evidence which might be produced. In other words, it cannot be sustained unless, under the admitted facts, the moving party is entitled to judgment, without regard to what the findings might be on the facts upon which issue is joined. ♦

JUDGMENT ON THE PLEADINGS—RIGHT TO, HOW DETERMINED.—In determining the right of a party to a judgment given him on the pleadings, the real question to determine is the sufficiency of the admitted facts to warrant the judgment rendered, and the materiality of those upon which issue is joined.

COTENANCY—PURCHASE OF OUTSTANDING TITLE—EFFECT OF.—A purchase by a tenant in common of an outstanding title to the premises ordinarily inures to the benefit of his cotenant, and this applies to a mining claim.

COTENANCY—PURCHASE OF OUTSTANDING TITLE.—THE OBTAINING OF A PATENT FOR MINERAL LAND, by a cotenant, in his own name, is not the purchase of an outstanding adverse title by a cotenant, as that expression is ordinarily used, but rather the perfection of the common title, which inures to the benefit of the cotenants of the patentee, who holds as trustee for his co-owners in the premises.

APPEAL—WHAT CANNOT FIRST BE RAISED ON.—An objection to a departure from the cause of action stated in the complaint cannot be raised, for the first time, in the appellate court.

A MOTION FOR JUDGMENT ON THE PLEADINGS cannot prevail, unless, on the facts thereby established, the court can, as a matter of law, pronounce a judgment on the merits, one final between the parties.

A MOTION FOR JUDGMENT ON THE PLEADINGS cannot, under the guise of such a motion, be substituted for some other plea.

Action brought by the plaintiffs, Mills and others, to recover from the defendants, Hart and others, an interest in the Nevada and Champion lodes, and the value of ores extracted from the mines. It was alleged that the claims were located on April

13, 1880; that the plaintiffs purchased their interest from the locators; that they and their grantors had complied with the mining laws; that subsequent to such purchase, the defendants, or some of them, in 1886, became the owners, by purchase, of the remaining interests in the claims; and that they thereafter entered into the exclusive possession of the property in controversy. Hart and a defendant company answered that the latter was the owner of the property, and held a receiver's receipt and patent therefor, and that the company deraigned its title to the premises described in the complaint, from relocations thereof, as abandoned property. It was alleged that the annual work, required by law, on the claims had not been performed for the year 1881, and that the claims were relocated on January 2, 1882. It was also alleged that the defendants, Perkins, Shreve, Hubbell, and Hart, by mesne conveyances, became the owners of the relocated property on February 19, 1886; that subsequently the defendant company became the owner, without notice that the plaintiffs claimed or had any interest therein; that the defendant company and its grantors had complied with the mining laws; that on May 11, 1886, the individual defendants above named filed an amended location certificate, without waiving any rights acquired under the relocations of January 2, 1882, in which the two claims were included as one, named the Champion; and that on April 12, 1887, an application for a patent was filed, on which application a receiver's receipt was issued on November 11, 1891, and a patent issued to the company on May 21, 1892. The plaintiffs, in their replications to these answers, admitted the issuance of the receiver's certificate and patent. They denied that in 1881 the work was not performed on the Nevada and Champion lodes, and averred the performance of the work thereon for that year. They denied that the company became the owner without notice of the plaintiffs' claims and rights in the property, but averred, on the contrary, that it went into possession and purchased the property with full knowledge of such rights and claims. The company and Hart moved for judgment on the pleadings, based on the ground that, by the replication, the issuance of the patent to the company was admitted. The court sustained this motion and rendered judgment that the company was the owner of the Champion, and that the defendants go hence. The plaintiffs appealed.

Charles J. Hughes, Jr., A. R. Brown, and Frank H. Giles, for the appellant.

Charles C. Parsons and Henry J. Murray, for the appellee.

⁵⁰⁷ GABBERT, J. By the pleadings, issues were joined upon the following questions: 1. The relationship of cotenancy between the plaintiffs and the individual defendants; 2. Acquisition of title by defendant company, with knowledge or notice of the rights and claims of plaintiffs.

As a general proposition, a motion for judgment on the pleadings, based on the facts thereby established, cannot be sustained, except where, under such facts, a judgment different from that pronounced could not be rendered, notwithstanding any evidence which might be produced: *Rice v. Bush*, 16 Colo. 484; or that such a motion cannot be sustained, unless, under the admitted facts, the moving party is entitled to judgment, without regard to what the findings might be on the facts upon which issue is joined; so that, in determining the rights of the defendants to the judgment given them, the real question to determine is the sufficiency of the admitted facts to warrant the judgment rendered, and the materiality of those upon which issue is joined. A purchase by a tenant in common of an outstanding title to the premises ordinarily inures to the benefit of his cotenant: *Franklin M. Co. v. O'Brien*, 22 Colo. 129; 55 Am. St. Rep. 118; *Freeman on Cotenancy and Partition*, sec. 154. A purchase by the individual defendants, or some of them, of an interest in the locations of April 13, 1880, would make the defendants thus purchasing and the plaintiffs co-owners in these locations. During the existence of this relationship, a purchase by such defendants of the title initiated by the relocations of January 2, 1882, would inure to the benefit of their co-owners in the original locations. A purchase by the company from such defendants, with notice of the rights of plaintiffs, would vest the title in the former, burdened with the equities of the latter therein, and the title thus held by the company would be in trust for the plaintiffs to the extent of their interest in the premises.

⁵⁰⁸ The averments of the pleadings of the plaintiffs as to the time when the individual defendants, or some of them, purchased an interest in the original locations, as also the character of their rights in the premises, of which the company was advised at the time it acquired title, are very indefinite; but, for the purposes of this motion, it cannot be assumed that an issue was not joined upon the question of the existence of the relationship of cotenancy between them and some of the individual defendants in the locations of April 13, 1880, at the time the latter purchased the relocations of January 2, 1882,

or that issue was not joined upon the question of acquisition of title by the company, with notice of such rights of the plaintiffs in the premises as would preserve their equities therein. With these issues made, the issuance of the patent was not conclusive of the rights of the parties in the premises. Obtaining patent from the government for mineral land, by a cotenant, in his own name, is not the purchase of an outstanding adverse title by a cotenant, as that expression is ordinarily used; but, rather, the perfection of the common title, which inures to be benefit of the cotenants of the patentee, to which the above rule of cotenancy applies, for the reason that cotenants stand in that relation of mutual trust and confidence toward each other that the title thus acquired by patent, the patentee holds as trustee for his co-owners in the premises: *Sawyer v. Turner*, 16 Morrison, 360; affirmed in *Turner v. Sawyer*, 150 U. S. 587. It therefore follows that these issues were material; upon their determination depended the rights of the parties in the premises, and the court could not pronounce judgment upon the merits until it had heard the evidence on these subjects, and determined the facts in relation thereto.

We do not wish to be understood as holding that the above rule regarding the effect of the acquisition of an adverse title by a cotenant is inflexible; on the contrary, there are exceptions, but, under the issues made by the pleadings, we cannot say that this case falls within any exception to the general rule. It is argued by appellants that other material ⁵⁰⁹ issues were made by the pleadings, but, as the case must be remanded, it is not considered advisable to discuss this subject further.

On behalf of appellees, it is contended that the motion was properly sustained, for the reasons: 1. A patent is conclusive in an action in ejectment, and judgment for possession of property cannot be rendered in such an action against the patentee; 2. Plaintiffs cannot, by replication, change the action from one at law to a suit in equity; 3. That plaintiffs have not pleaded tender of their pro rata share of the expense of obtaining patent, or an offer to contribute such share.

As an answer to the first proposition, it is sufficient to suggest that this is a suit in equity, to have the defendant company declared trustee of the legal title for the benefit of the plaintiffs, to the extent of their interest therein.

With the suggestion, as an answer to the second, that an objection to a departure from the cause of action stated in the complaint cannot, for the first time, be raised in this court

(Kannaugh v. Quartette etc. Co., 16 Colo. 341), the second and third propositions may be considered together. A motion for judgment on the pleadings cannot prevail, unless, on the facts thereby established, the court, as a matter of law, can pronounce a judgment on the merits; that is, determine the rights of the parties to the subject matter of the controversy, and render a judgment in relation thereto which is final between the parties. Such a motion cannot, under the guise of motion for judgment on the pleadings, be substituted for some other plea: Harris v. Harris, 9 Colo. App. 211. If there was a departure from the cause of action originally pleaded, or if the replication or other pleadings of the plaintiffs failed to state facts sufficient to entitle them to maintain the action, these were objectionable features which should have been raised by motion or demurrer. With material issues presented by the pleadings of the plaintiffs, though insufficient or improperly pleaded, ⁵¹⁰ the court could not, on motion, render judgment on the merits, establishing the rights of either of the parties to the subject matter of the controversy.

The judgment is reversed, and the cause remanded, with directions to overrule the motion for judgment on the pleadings.

COTENANCY—PURCHASE OF OUTSTANDING TITLE OF MINING CLAIM.—The rule that the purchase of an outstanding title by a tenant in common inures to the benefit of all of the cotenants applies to the purchase by a cotenant in a mining claim of an interest in a senior conflicting claim: Franklin Min. Co. v. O'Brien, 22 Col. 129; 55 Am. St. Rep. 118.

APPEAL.—A QUESTION NOT RAISED AT THE TRIAL will not be considered for the first time on appeal: Relch v. Cochran, 151 N. Y. 122; 56 Am. St. Rep. 607, and note.

JUDGMENT ON THE PLEADINGS is authorized only where the answer admits or leaves undenied the material facts stated in the complaint: Hicks v. Lovell, 64 Cal. 14; 49 Am. Rep. 579.

POOLE v. PEOPLE.

[24 COLORADO, 510.]

INFORMATION—FAILURE TO SUPPORT WIFE—CHARGING THE OFFENSE—TIME.—An information was filed with a justice of the peace, on January 18, 1897, charging a party with failure to support his wife, and carelessly alleged the time of the offense as "on or about the nineteenth day of September, and continuously since, A. D. 1897"; but from the language employed, charging the time when the offense was committed, it was held to be fairly inferable that it was at a date prior to the time when the information was filed with the justice.

INFORMATION—FORM—AMBIGUITY.—Although an information may be successfully attacked, at the proper time, by a mo-

tion on account of form, or ambiguity, it is too late to raise that question after trial.

INFORMATION.—IN CHARGING AN OFFENSE. It is sufficient to allege the facts constituting it, and is not necessary to aver facts to show affirmatively that the person charged is one who can be prosecuted for such offense.

INFORMATION—FAILURE TO SUPPORT WIFE—CHARGING THE OFFENSE.—The statutory offense of the failure of a husband to support his wife consists of the husband's willful neglect to provide reasonable support and maintenance for his wife, and it is not necessary to allege in the information that the defendant is a resident of the state, where nonresidents are excepted from the operation of the statute. It is not necessary to negative exceptions, and if the defendant is a nonresident, that is a matter of defense.

MARRIAGE—VOID CONTRACT OF, BY REASON OF DISABILITY—STATUS OF PARTIES AFTER REMOVAL OF DISABILITY.—Although a man and woman desire marriage, and do what they can to render their union matrimonial, the marriage contract is void if one of them is under a disability, but if they live together as husband and wife after such disability is removed, they are, in law, husband and wife, from the time of such removal, where the law requires only mutual consent to make the parties husband and wife.

APPEAL—ADMISSION OF EVIDENCE—WHAT IS NOT PREJUDICIAL ERROR.—In a statutory action by a wife against her husband for a failure to support her, the admission of a copy of a decree of a court of a sister state, though improperly attested, to establish the relationship of husband and wife between the parties, such decree showing that they were marriageable on a certain date, and that they were, on that date, married, is not prejudicial error, where there is other evidence which conclusively establishes the relationship.

MARRIAGE—EVIDENCE—MUTUAL CONSENT.—The relationship of husband and wife is established by evidence showing that prior to a certain date, the parties lived together, in good faith, as husband and wife, though one of them was under a disability, but that immediately prior to that date the disability was removed, and that subsequent to that date they lived together, in good faith, as husband and wife.

BONDS—ABSENCE IN, OF SPECIFIC PROVISIONS—AUTHORITY OF COURT.—If a statute makes it unlawful for a husband to willfully neglect, fail, or refuse to support his wife, and authorizes the acceptance of a bond conditioned for the support of the wife for six months, in lieu of the penalty, but does not provide a penalty for the bond, and does not fix the amount or time of payments for the wife's support, the court has authority, in a prosecution under such a statute, to provide a penalty for the bond, and to make specific provisions as to when payments shall be made to the wife, as well as their amount.

CRIMINAL LAW—ARRAIGNMENT—PLEA.—If a defendant is arraigned before a justice of the peace and pleads not guilty, it is not necessary for him, on appeal to a county court, to be re-arraigned, or to replead in that court.

CRIMINAL LAW—FAILURE TO SUPPORT WIFE—FINANCIAL MEANS OF WIFE.—The fact that a wife has financial means does not relieve her husband from his statutory duty of supporting her, especially where no claim is made that such means were obtained from him. Hence, evidence that she had such means prior to the commencement of a prosecution under such a statute is wholly immaterial.

Information charging Poole with a failure to support his wife. It was filed by Mrs. Poole before a justice of the peace on January 18, 1897, and alleged the time of the offense as "on or about the nineteenth day of September, and continuously since, A. D. 1897." The defendant, upon arraignment, pleaded not guilty. A trial resulted in his conviction. He appealed to the county court, where he was again convicted, and judgment pronounced that he be confined in the county jail for a period of forty days, or, in lieu thereof, give a bond in the sum of six hundred dollars, conditioned for the payment, to the prosecuting witness, of the sum of fifty dollars per month for six months. He sued out a writ of error. One error assigned was that the court erred in admitting in evidence, over the defendant's objection, a decree of the superior court of San Diego county, California. Another was that the court erred in sustaining the objection of the people to the defendant's offer to prove that the prosecuting witness had, about April 7, 1897, given certain persons money, and had money of her own. The other assignments of error appear clearly enough in the opinion. The prosecution was based upon a statute which read as follows: "It shall be unlawful for any man, residing in this state, to willfully neglect, fail, or refuse to provide reasonable support and maintenance for his wife . . . ; and any person guilty of such neglect, failure, or refusal, upon the complaint of the wife . . . upon due conviction thereof, shall be adjudged guilty of a misdemeanor, and shall be committed to the county jail for the period of not more than sixty (60) days unless it shall appear that owing to physical incapacity or other good cause, he is unable to furnish such support; provided, that in case of conviction for the offense aforesaid, the court before which such conviction is had may, in lieu of the penalty herein provided, accept from the person convicted a bond to the board of county commissioners of the county in which such conviction is had, with good and sufficient surety, conditioned for the support of the wife . . . for the term of six months after the date of said conviction; and the court may accept such bond at any time after such conviction, and order the release of the person so convicted."

William T. Rogers and A. J. Rising, for the plaintiff in error.

Byron L. Carr, attorney general, Calvin E. Reed, John Hipp, and C. W. Stephenson, for the defendant in error.

⁵¹³ GABBERT, J. The first objection to the information urged is, that plaintiff in error is charged with having committed the offense at an impossible date, viz., September, 1897. The information is carelessly drawn, but from the language employed, charging the time when the offense was committed, it is fairly inferable that it was at a date prior to the time when it was filed with the justice, and although it might have been successfully attacked at the proper time, by a motion on account of form, or ambiguity, it is too late to raise that question after trial: 1 Mills' Annotated Statutes, sec. 1433. It is urged that the information does not state that plaintiff in error was a resident of the state. The offense consists of the willful neglect of a husband to provide reasonable support and maintenance for his wife. In charging an offense, it is sufficient to allege the facts constituting it, and is not necessary to aver facts to show affirmatively that the person charged is one who can be prosecuted for such offense. Nonresidents are excepted from the operation of the act; but it is not necessary to negative exceptions; if plaintiff in error was a nonresident of the state, that was a matter of defense.

It is contended that the evidence failed to establish the relationship of husband and wife between plaintiff in error and the prosecuting witness. It appears, conclusively, from a certified copy of the records, that the parties were married ⁵¹⁴ in due form, at Golden, in this state, the twenty-sixth day of August, 1881. At this time, the prosecuting witness was a married woman, although she seems to have then believed she was divorced from her former husband. Plaintiff in error knew of her former marriage, but appears, also, to have believed that she had been divorced; so that, although the marriage contract of August 26, 1881, was a nullity on account of the incapacity of Mrs. Poole to enter into a valid marriage contract, both were innocent of any willful intention to commit a wrong. March 31, 1882, the former husband procured a divorce from Mrs. Poole. The plaintiff in error admits that he knew of these proceedings; whether Mrs. Poole did is not altogether clear. After this knowledge on his part, with the exception of a very brief period, they continued to live together as husband and wife until sometime in 1891. Since that date, they have sustained that relationship, at least a greater portion of the time, down to September 19, 1896. If parties desire marriage, and do what they can to render their union matrimonial, but one of them is under a disability, their cohabitation thus

matrimonially meant and continued, after the disability is removed, will, in law, make them husband and wife from the moment that such disability no longer exists: 1 Bishop on Marriage, Divorce, and Separation, secs. 970, 979. Or, as otherwise stated by this author: "To employ words more nicely accurate, and cover a larger ground, the living together of marriageable parties a single day as married, they meaning marriage, and the law requiring only mutual consent, makes them husband and wife": 1 Bishop on Marriage, Divorce, and Separation, sec. 975.

The facts in this case certainly bring the parties within the doctrine above announced. They attempted, in good faith, to enter into a legal marriage contract by procuring license, and solemnization of marriage in the usual way. After the disability of Mrs. Poole had been removed, they continued to live together as husband and wife, held each other out to the public as sustaining that relation; and although no subsequent marriage ceremony was performed, as ⁵¹⁵ is usual to evidence contracts of this character, they having originally assumed the marriage relation in good faith, in pursuance of what they believed to be a valid contract of marriage, and having continued that relationship for a long period after it could have been legally assumed, raises the presumption that thereby they intended and meant marriage, mutually assented to a contract of that character.

The objection to the decree was, that it was not properly certified under the act of Congress, the certificate thereto being signed by a deputy clerk. Whether the attestation of the decree of a court of a sister state is sufficient when signed by a deputy clerk of the court only, it is not necessary to determine. The decree in question purported to find that the parties were, on the first day of April, 1882, capable of entering into a marriage contract, and that they were, on the said day, legally married. If not properly attested, the introduction of this decree might have been error on account of its possible influence on the jury in determining the issue of marriage; but the evidence of the plaintiff in error on this subject was, that Mrs. Poole and himself had lived together and recognized each other as husband and wife for a number of years after the impediment to their legal marriage was removed; and this admission, coupled with the uncontroverted fact that they had attempted, in good faith, to enter into the marriage relation before that time, conclusively established this relationship, and, therefore, the admission of the

copy of this decree was not prejudicial error. Regarding this decree, Mrs. Poole testifies that her husband told her he had compared the identical copy which was offered in evidence with the original, and informed her it was a true copy, and that, in discussing the matter further, they agreed to accept it as evidencing their true relation; so, for the purpose of showing the character of this agreement, it was proper for the jury to consider the copy admitted. This, apparently, was the view entertained by the trial court, in ruling upon its admissibility, and subsequently instructing the jury upon the subject.

⁵¹⁶ The statute authorizes the acceptance of a bond in lieu of the penalty provided; true, it does not designate that the bond shall be executed in any penalty, or in express terms empower the court to fix the penalty thereof; the bond shall be conditioned for the support of the wife for a specific period, but there can be no objection if the order therefor names the penalty in which it shall be executed, or the sum to be paid at stated intervals for her support. In the absence of specific provisions regarding the terms and conditions of the bond, the court has authority to make such order in relation thereto, as will subserve the purposes for which it is to be given, viz., the support of the wife for the period of six months from and after conviction of the husband for nonsupport.

Plaintiff in error was arraigned and pleaded not guilty before the justice. On appeal, the cause came up for trial *de novo* on the issues made in the court below, and it was not necessary that he be rearraigned, or replead in the appellate court any more than it was necessary for the people to file another information. By arraignment before the justice, he was informed of the nature of the charge. Having there pleaded, the issues were made, and the effect of the appeal was to permit the plaintiff in error a new trial on such issues.

The statute upon which this prosecution is based does not change the law as to the civil liability of the husband to furnish his wife reasonable support; it provides a penalty in case he fails to do so, unless excused by physical incapacity or other good cause; he is not relieved from furnishing such support on account of the financial means of his wife, either by the general law, or the statute, and so the offer of plaintiff in error to prove that the prosecuting witness had means of her own, at a time several months prior to the institution of these proceedings, it not being claimed that such means were obtained from

the husband, was wholly immaterial. There is no reversible error, and the judgment is affirmed.

INFORMATION—CHARGING THE OFFENSE—NEGATIVING EXCEPTIONS.—The sufficiency of an information must be determined by the same rules that govern indictments: *State v. Barnett*, 8 Kan. 250; 87 Am. Dec. 471. An impossible or future date stated in an indictment is fatal. An indictment in which no day at all is stated as the date of the commission of the offense, will not support a judgment of conviction: *State v. Ray*, *Rice's Law*, 1; 33 Am. Dec. 90, 96. In criminal pleading nothing can be taken by intendment: *State v. Thurstin*, 35 Me. 205; 58 Am. Dec. 695. An indictment is sufficient if it states the charge with sufficient certainty to inform the defendant what he is called upon to answer: *Sherban v. Commonwealth*, 8 Watts, 212; 34 Am. Dec. 460. An indictment under one section of a statute need not negative an exception contained in a subsequent section thereof: *State v. Shiflett*, 20 Mo. 415; 64 Am. Dec. 190. Compare note to *State v. Johnson*, 93 Am. Dec. 251.

INFORMATION—OBJECTIONS.—IT IS TOO LATE, after verdict, to object to duplicity in an information for a misdemeanor. Such objections should be made at the proper time and by the method prescribed: *State v. Armstrong*, 106 Mo. 395; 27 Am. St. Rep. 361.

MARRIAGE VOID BECAUSE OF IMPEDIMENT—LIVING TOGETHER AFTER REMOVAL OF DISABILITY.—The essentials of a valid marriage are capacity and consent: *Voorhees v. Voorhees*, 46 N. J. Eq., 411; 19 Am. St. Rep. 404; and a mutual agreement between a man and woman to take each other, in good faith, for husband and wife, constitutes a valid marriage: Notes to *Kilburn v. Kilburn*, 23 Am. St. Rep. 451; *Farley v. Farley*, 33 Am. St. Rep. 144. A marriage contracted while a previous marriage of the husband remains unannulled, though he had previously obtained a void decree of divorce in another state, has no legal force whatever: *Collins v. Voorhees*, 47 N. J. Eq., 315; 24 Am. St. Rep. 412. But parties to a void marriage may continue living together as husband and wife, after the removal of the impediment to a valid marriage, and a jury may presume a valid marriage to have taken place after the removal of the previous impediment: Notes to *Cartwright v. McGown*, 2 Am. St. Rep. 117; *Collins v. Voorhees*, 24 Am. St. Rep. 415.

SMITH v. SMITH.

[24 COLORADO, 527.]

APPEAL.—UNDER THE DOCTRINE OF THE "LAW OF THE CASE," the conclusions announced by an appellate court upon the review of a case are, on a second appeal, *res judicata* as to the points decided, unless a new and different state of facts has been established on the new trial.

FRAUDULENT CONVEYANCES — HUSBAND'S POWER TO DISPOSE OF HIS PROPERTY—FRAUD UPON RIGHTS OF WIFE.—A husband has power to dispose absolutely of his property during his life, independently of the concurrence, and exonerated from the claim, of his wife, if the transaction is not merely colorable, and is not attended with circumstances indicative of fraud upon the rights of the wife. If the disposition of the husband

is bona fide, and no right is reserved to him, though made to defeat the right of the wife, it will be good against her.

FRAUDULENT CONVEYANCES — HUSBAND'S POWER TO DISPOSE OF HIS PROPERTY—FRAUD UPON RIGHTS OF WIFE.—If a husband makes a mere colorable disposition of his property, for the purpose of defeating the rights of his wife as his heir, and manifests an intention of reserving to himself the exclusive dominion and control of the property, and the reservation to himself of the right to use and enjoy it during his lifetime; the transaction is a fraud on the rights of the wife and will be set aside.

FRAUDULENT CONVEYANCES — HUSBAND'S FRAUD UPON RIGHTS OF HIS WIFE.—If a married man conveys his property to his children, but retains control of the property and withholds the deeds from record for the period of four years after their execution, and his wife has no knowledge thereof until after the grantor's death, the fact that all the deeds were thus withheld leads very strongly to the conclusion that it was done as the result of an understanding between the grantor and grantees, and that the grantees were guilty of collusion in the matter for the purpose of preventing information of the transfer from reaching the wife of the grantor, and to permit him, in the mean time, to continue to exercise exclusive dominion and control over the property.

David Mitchell and N. M. Laws, for the appellant.

W. C. Kingsley, and Bartels & Blood, for the appellee.

⁵²⁸ GODDARD, J. This case, consolidated with two other like cases, was before us on a former appeal, *Smith v. Smith*, 22 Colo. 480, 55 Am. St. Rep. 142, and many of the questions now presented were then considered and determined. It will be seen by a reference to the statement of the case as there made that the object of the action is to compel the appellant to convey to appellee a certain interest in real estate alleged to have been conveyed to him by his father, the husband of appellee, in fraud of her rights. It also appears from the opinion then rendered that the complaint stated a cause of action, and, upon the evidence contained in the record, the appellee was entitled to the relief sought; but the judgment in her favor was reversed upon the sole ground that the district court erred in consolidating the cases, and thereby preventing the appellant and the other defendants from fully presenting their defenses. In so far as the specifications of error challenge the sufficiency of the complaint, or the right of appellee to introduce evidence in support of its averments, or the correctness of any other of our rulings upon the former review, they are not now open to consideration. Under the doctrine of the "law of the case," the conclusions then announced ⁵²⁹ are controlling upon this review, unless a new and different state of facts has been established on the new trial. It only remains, therefore, for us to determine whether the facts developed upon the last trial

are so materially different from those disclosed in the former record as to take the case out of the rule laid down in our former opinion. We accepted as a correct statement of the law, the following from Kerr on Fraud and Mistake: "There can be no doubt of the power of a husband to dispose absolutely of his property during his life, independently of the concurrence, and exonerated from the claim, of his wife, provided the transaction is not merely colorable, and be unattended with circumstances indicative of fraud upon the rights of the wife. If the disposition of the husband be bona fide, and no right is reserved to him, though made to defeat the right of the wife, it will be good against her."

And the chief justice, speaking for the court, used this language: "The proof shows that these three several deeds were held from record for the period of four years after their execution. If one of these deeds had been withheld from record for that length of time, this would be a suspicious circumstance, while the fact that all were thus withheld leads very strongly to the conclusion that they were so withheld as a result of an understanding between the grantor and the three grantees, and that these grantees were guilty of collusion in the matter for the purpose of preventing information of the transfer from reaching the wife of the grantor, and to permit the grantor in the meantime to continue to exercise exclusive dominion and control over the property. . . . It is not necessary in this case, and it is not our intention to say anything that will prevent the husband, during his lifetime, from selling his personal property, or transferring his real estate for such consideration as he may be willing to accept, or without consideration, provided always that the transaction shall be absolute and bona fide, and not colorable merely, but what we do say is, where, as here, the complaint charges, and the evidence shows, that ²⁵⁰ the transaction complained of is colorable only and resorted to by the husband for the purpose of defeating his wife's right as his heir, he hoping thereby to obtain the full benefit of the property to the last hour of his life, and at the same time being able to deprive her of all interest therein as his heir, is as much of a fraud on the part of the husband as it is for a debtor, having in contemplation the incurring of an indebtedness, to put his property beyond his control."

While the condition of the appellee is referred to elsewhere in the opinion as emphasizing the inequitable nature of the transaction, the circumstances that vitiate the transfer are that

the transaction is merely colorable, and was resorted to by the grantor to defeat appellee's right as heir, and the retention by him of exclusive dominion and control of the property, and the reservation to himself of the right to use and enjoy it during his lifetime. Upon this feature of the case the court below made the following findings of fact:

"That on the said twenty-eighth day of August, 1888, the said Horace G. Smith made and executed three certain conveyances to his said three children for the nominal consideration of one dollar each, one to the defendant herein and hereinafter particularly referred to, whereby he pretended to convey about one-third in value of all of his said real estate; . . . that none of said deeds were filed for record until the sixteenth day of August, A. D. 1892; that the said plaintiff had no knowledge of the making or the existence of said deeds until after the death of the said Horace G. Smith; that from the time of making said deeds to the time when said deeds were filed for record as aforesaid, the said Horace G. Smith retained the possession, dominion, and control over the property described therein, and during all of said time he received the rents, income, and revenues therefrom, and exercised the exclusive rights of ownership in all of said property the same as if said deeds had never been executed; that said pretended conveyances of the said Horace G. Smith were a mere device and contrivance by which the said Horace G. Smith, not parting nor intending to part with the dominion ⁵⁸¹ or control over said real estate during his life, sought and endeavored at the time of his death, to deprive the plaintiff of the benefits conferred upon her as an heir of her husband under the statutes; that said conveyance to the said defendant Horace G. Smith, Jr., was and is colorable merely and was resorted to by the husband of the said plaintiff for the purpose of defeating the plaintiff's rights as his heir, he hoping thereby to obtain the full benefit of the property to the last hour of his life, and at the same time to be able to deprive her of all interest therein as his heir.

"The court doth further find that all of the allegations in the plaintiff's complaint are true as therein alleged, and that the allegations contained in the answer of the said defendant are not true."

These findings clearly bring the case within the rule announced, and are decisive of this controversy. While it is true that the evidence is conflicting, the weight and preponderance

support the court's conclusion; and under the well-settled rule we are precluded from disturbing its findings.

The error assigned upon the admission of testimony might be disregarded as too general to require notice; but upon examination of the evidence complained of, while some of it might be objectionable, we are satisfied that its admission in no way prejudiced defendant's case. Upon a careful examination of the record, we perceive no error that would justify a reversal. The judgment of the district court is accordingly affirmed.

APPEAL—LAW OF THE CASE.—The decision of the supreme court upon a former appeal in a case is, as to every point presented and decided on such appeal, the law of the case, binding upon both the parties and the court, so far as the same state of facts is substantially presented, but no further: Note to Louisville etc. R. R. Co. v. Offutt, 59 Am. St. Rep. 473.

FRAUDULENT CONVEYANCES BY HUSBAND IN FRAUD OF WIFE.—Colorable transfers made by a husband are void as against the rights of the wife. Conveyances of real estate made by a husband during coverture for the purpose of defeating the wife's marital rights are fraudulent and void as against her: Note to Smith v. Smith, 55 Am. St. Rep. 148.

CASES
IN THE
SUPREME COURT
OF
DELAWARE.

MAYOR AND COUNCIL OF WILMINGTON V. VANDE-GRIFT.

[1 MARVEL (DEL.) 5]

MUNICIPAL CORPORATIONS—PLEADINGS—CHARTER AND ORDINANCES AS PART OF.—In an action against a municipal corporation to recover for injury received by reason of the willful negligence of the city in permitting obstructions to remain in its streets amounting to a nuisance, the municipal ordinances and charter are as much the legitimate subjects of inquiry as if literally incorporated in the pleadings, and this is so notwithstanding the allegation of actionable negligence and admissions made by demurrer.

MUNICIPAL CORPORATIONS—PLEADINGS.—In an action against a city, an averment that the accident complained of was the result of a willful disregard of corporate duty is more in the nature of a conclusion of law than a bare statement of fact, and a demurrant is concluded by the admissions made by demurrer, only so far as such averment is sustained or supported by the law of its being, and the principles which underlie the duties and liabilities of municipal corporations.

MUNICIPAL CORPORATIONS—NUISANCE—COASTING—LIABILITY FOR.—Coasting on the public street of a city in such manner as to imperil the safety of pedestrians thereon is a public nuisance, independently of municipal ordinances.

MUNICIPAL CORPORATIONS—NUISANCE—ORDINANCE UNNECESSARY.—If an act is a public nuisance at common law, the failure of the city in which such act is committed to legislate upon it or to forbid it is not a neglect of duty.

MUNICIPAL CORPORATIONS—NUISANCES—DUTY TO SUPPRESS.—The duty of the peace officers of a city to suppress a public nuisance maintained therein is a public, as distinguished from a strictly corporate duty, and the failure of such officers to perform such duty does not render the municipality liable therefor.

C. M. Curtis, city solicitor, for the plaintiff in error.

J. Biggs, for the defendant in error.

¹⁰ WOLCOTT, C. This was an action on the case, instituted in the court below against the mayor and council of Wilmington (a corporation existing ¹¹ under the laws of the state of Delaware) by Joseph W. Vandegrift, to recover damages for injuries received while walking along French street, in the city of Wilmington, at or near its intersection with Seventh street. It is alleged in the declaration that the plaintiff in error willfully and negligently suffered boys and other persons to frequently use said Seventh street for the purpose of sledding and coasting thereon in an unlawful and improper manner, and that, by reason of such allowance of such unlawful use of said Seventh street, the defendant in error, while lawfully walking along French street, at or near its intersection with said Seventh street, was run into and knocked down by a sled propelled by the weight of one Joseph McHugh and thereby seriously injured. Wherefore he claimed large damages. To the declaration the plaintiff in error demurred generally, and, in accordance with act of the assembly in that behalf specified divers causes of demurrer to the said declaration and the several counts thereof. The court overruled the demurrer and rendered judgment in favor of the defendant in error. Thereupon the plaintiff in error brought the case to this court to be reviewed on writ of error. The judgment was assigned as error.

For the purposes of this case it is unnecessary to notice separately the several counts in which the cause of action is variously described. It is sufficient to state that the declaration contains a circumstantial statement of the injuries complained of and a distinct averment that they were the result of the willful negligence of the plaintiff in error. The demurrer admits all the facts set forth in the declaration that are properly pleaded to be true. The only question, therefore, with which this court can deal is whether those facts, in law, constitute a sufficient ground of action. To determine this question it is necessary to ascertain what the duties and powers of the plaintiff in error were in respect to the prevention and suppression of the practice of coasting on the streets of Wilmington, or such other unlawful use thereof as would interfere with or render unsafe public travel. This will necessarily involve ¹² the duty of making a critical examination of those provisions of the city charter relating to that subject and the regulations established by the city authorities in that behalf. While this court, sitting as a court of errors, cannot go outside of the record for any facts upon which to rest its judgment, yet we think, notwithstanding the

allegation of actionable negligence and the admission made by the demurrer, that the act of assembly from which the plaintiff in error derives its existence, and the ordinances enacted in pursuance thereof, are as much the subject of legitimate inquiry as if they were literally incorporated in the pleadings before us. The averment that the accident complained of was the result of a willful disregard of a corporate duty was more in the nature of a conclusion of law than a bare statement of fact; and consequently the demurrant is concluded by the admission made by the demurrer, only so far as such averment is sustained or supported by the law of its being, and the principles which underlie the duties and liabilities of municipal corporations. To decide the question presented by the record in this case independently of the charter of the municipality of Wilmington and the ordinances would limit the scope of our inquiry to the consideration merely of the regularity of the pleadings, and thus leave untouched the real essence of the controversy and subject the parties to the necessity of pursuing their rights in the court below according to the course of law in that jurisdiction prescribed. While general principles are always of great assistance in determining the liabilities of a municipal corporation in civil actions for private injuries, yet the terms employed by the legislature to convey or impart its powers are of first importance in ascertaining its duties and corresponding liabilities.

The counsel for the defendant in error assumed in his argument that the practice of coasting on Seventh street, as alleged in the declaration, was a public nuisance, and contended with much force that the plaintiff in error was liable for the damages thereby sustained by his client, because no steps were taken by it, through ¹³ the agency of the street and sewer department pursuant to the authority given to define and remove nuisances in section 31 of its charter, to declare such practice to be a nuisance and prohibit the continuance thereof, after its dangerous character had been brought to its knowledge. Now, let us see whether this contention is met or satisfied by any of the provisions of said charter. By section 14 of the charter a municipal court is created, and by section 15 its jurisdiction is limited and defined. By the latter section it is given "sole and exclusive jurisdiction to inquire of, hear, try, and finally determine all those criminal matters and offenses enumerated in the fifteenth section of the sixth article of the amended constitution and committed within said city and to punish all persons convicted of said offenses or any of them agreeably to the laws of this state."

The fifteenth section of the sixth article of the constitution, referred to, confers upon the general assembly of this state power to establish inferior courts and clothe them with jurisdiction of certain criminal matters, and among them are enumerated nuisances. It is, therefore, clear that the municipal court of the city of Wilmington had jurisdiction of public nuisances, as it is an inferior court established by the general assembly of this state pursuant to the section and article of the constitution before referred to. Was the practice of coasting, as set forth in the declaration, such a nuisance as was contemplated by the framers of the constitution? We have no doubt that it was, for it answers to and contains all the elements necessary to constitute a nuisance indictable at common law, and punishable under the laws of this state. A learned writer on the subject defines a common or public nuisance "to be an unlawful act or omission to discharge a legal duty, which act or omission endangers the lives, safety, health, or comfort of the public, or by which the public are obstructed in the exercise or enjoyment of a right common to all." Seventh street is a well-known public highway in the city of Wilmington, and for purposes of travel the people had a right to the free and uninterrupted use thereof. The occupation of said street by persons indulging in the ¹⁴ sport of coasting, as described in the declaration, was unlawful, independently of any ordinance, and certainly endangered the lives and safety of the people and constituted a serious obstruction of the public in the exercise or enjoyment of a common right. It was therefore a common nuisance and clearly within the definition quoted. The municipal court, it will be observed, is clothed with full power to punish persons convicted of such an offense, agreeably to the laws of this state. What is that punishment? The eighteenth section of chapter 127 of the Revised Code provides that "assaults, batteries, nuisances, and all other offenses indictable at common law and not specially provided for by statute, shall be deemed misdemeanors, and shall be punishable by fine and imprisonment, or either, according to the discretion of the court." Now, since the municipal court of Wilmington has complete jurisdiction of all nuisances indictable at common law, committed within its limits, with full power to inflict severe punishments upon offenders, what more effectual mode could have been devised than has been done for the prevention and suppression of the practice of coasting as alleged in the declaration? Clearly none. The passing of an ordinance by the street and sewer department imposing a fine upon any person who might be

engaged in such sport would have been an idle exercise of its legislative functions and would have fallen far short of the end intended to have been accomplished thereby.

It is claimed, however, that the jurisdiction of the municipal court over nuisances could not be legally invoked, because no ordinance was ever passed expressly defining this particular sport or practice to be a nuisance. But does its jurisdiction in respect to nuisances remain dormant or inactive until the acts and conditions that constitute nuisances are defined by ordinances to be such? Surely not, for the bare statement of such a proposition, in view of the express language or terms in which such jurisdiction is conferred, demonstrates its utter fallacy. Such jurisdiction was given without reservation or condition, and its utility or efficiency was ¹⁵ not made to depend upon the contingency of the passing or not passing of ordinances defining such offenses to be nuisances. With the same propriety it might be contended that the court of general sessions, sitting in either county of this state, could not exercise jurisdiction of nuisances committed without the city of Wilmington until the legislature had first declared by statute what the essentials of a common nuisance are. While it is true that the legislature may declare what a nuisance is, in the absence of such a declaration the court would be compelled to take cognizance of such matters, and conduct the same to a final hearing and determination. So the municipal court of Wilmington, notwithstanding the authority vested in the legislative body of the city to define nuisances, cannot, because of the omission to exercise such authority, legally refuse to assert its jurisdiction of the same, when formally and properly invoked. Of what practical use could the passage of such an ordinance be? For no definition of a nuisance, which included coasting on the streets of Wilmington, could be formulated by the wit of a man that could make it any more or less a nuisance than it was. It was intrinsically a common nuisance, the definition whereof is too well known, and its ingredients and characteristics too well understood to require even the sanction of the legislature of the state, much less the legislative body of any municipality therein, to make it more definite, or to impart more certainty to its signification than it already possesses. Another prevailing reason why the definition of a public nuisance by ordinance is not made a condition precedent to the exercise of jurisdiction of the same by the municipal court is that it would tend rather to confusion than to simplicity in the trial and conviction of persons charged with the

commission of such an offense. It is not probable that the legislative body of Wilmington could by ordinance improve on the common-law definition of a nuisance, embracing notorious obstructions of a public highway, which has for so long a time stood the test of the most severe judicial scrutiny and examination. There being then no necessity for such an ordinance (conceding for the ¹⁶ moment that none was ever passed), no duty in respect thereto ever arose, and, there being no duty, there was no liability. It borders on the absurd to suppose that the legislature intended by the incorporation of the city of Wilmington to impose any such unnecessary and superfluous duty on the legislative branch of its government.

In this connection, it may be asked, Why was the authority given to "the council" now the "street and sewer department" to define nuisances as provided in section 31 of the city charter? At first blush, it may appear to be inconsistent with the construction given to section 15 as to the powers and jurisdiction of the municipal court; but, upon a close examination of both sections together, this apparent inconsistency wholly disappears, for this authority may be construed to have effect without interfering or clashing with the jurisdiction of the municipal court, as provided in the first branch of the jurisdiction clause of said section 15. It may well have been given to declare such acts, conditions, and objects to be nuisances that are not clearly within the legal notion of a public nuisance at common law. How far such authority extends is a question we shall not stop to consider, as it is unnecessary for the purposes of this decision. It is certain, however, that a nuisance such as that described in the declaration was not intended to be brought within the general authority to define nuisances, for it is an offense against the state, the measure of whose punishment is fixed by a general law of the state; and any definition thereof, if contrary to the legal and well-settled definition of a common nuisance, would be void, and any definition merely declaratory of the same would simply be useless.

Having arrived at the conclusion that no municipal liability attached to a failure of the legislative body of the city to pass an ordinance defining coasting on its streets, as alleged in the declaration, it only remains now for the court to consider whether the neglect of the city constables to suppress such sport, upon the principle of respondeat superior, made the city liable to the defendant in error for injuries received at the time designated in the declaration. ¹⁷ The decision of this question depends upon

the solution of a preliminary question, which is whether such officers were, in respect to such police duty, the agents or servants of the state, or of the city in its corporate capacity. If the agents or servants of the former, clearly the city is not liable. It is sometimes quite difficult to draw the line of distinction between strictly corporate duties and public duties, as to the police officers of a municipality, but in this case the distinction is so well marked that we are not embarrassed with any perplexing question of that sort. By section 15 of the city charter the legislature conferred upon the municipal court sole and exclusive jurisdiction of the entire group of offenses (including nuisances) enumerated in the fifteenth section of the sixth article of the constitution, with power to hear, try, and finally determine the same under the laws of the state of Delaware. It frequently occurs that the state, in the distribution of its powers, for the sake of convenience and expediency, confides to certain local governments, within well-defined territorial limits, the power to administer criminal justice therein. But because such authority is limited to a certain locality or district, it does not make the duties which the possession of such power imposes, nor the agents charged with the performance thereof, any more or less public in their character. The preservation of the peace is one of the most important functions of state governments, and it makes no difference to what tribunal that duty or power is intrusted. It is still essentially a matter of public concern, and does not lose its public character. To commit any of the offenses within the city of Wilmington, of which the municipal court thereof is given sole and exclusive jurisdiction, would be an infraction of the laws of the state, and therefore against its peace and dignity, and punishable by said court, as it would be in the state court having general jurisdiction of the same according to the general provisions of law in that behalf. Assaults and batteries are included in the same category as nuisances. Now, could it be claimed with any show of reason that the duty of the police officers to break up ¹⁸ street fights and brawls is not a public duty, and that for the nonperformance or neglect thereof the municipality would be liable to anyone for a private injury occasioned thereby? Clearly not, because it is such a duty as relates to the execution of a state law, and the officers charged therewith, though servants of the municipality, are, to the extent of such duty, public officers, and for the neglect to perform the same no municipal liability attaches. The same is equally true as to the duty of police officers in regard to nuisances. The

municipal court of Wilmington is therefore a public instrumentality constituted by the legislature for the trial and punishment of such criminal disorders as are enumerated in the section and article of the constitution before referred to, and the duties of the municipal officers selected to execute its process in respect to such offenses are also stamped with the same character.

Thus far we have treated the contention of the learned counsel for the defendant in error that no ordinance was ever passed against the practice of coasting, as set forth in the declaration, as being true. Is it true in fact? By section 31 of the city charter the authority is given to the legislative body of the city generally to prescribe and regulate the use of the highways, streets, squares, lanes, and alleys of the city, and to have and exercise control over the same, subject to the charter limitations and to the general supervision and control of the general assembly. This power is sufficiently broad to cover nuisances occurring within the limits of any of the streets of the city that involved the idea of obstruction. Doubtless the nuisance complained of had the effect to obstruct said Seventh street, and thereby obstructed the public in the exercise or enjoyment of a public right and therefore clearly came within the power to prescribe and regulate the use of streets. That being so, if there was an ordinance prohibiting such an obstruction at the time of the accident set forth in the declaration, it clearly absolved the city from any liability on the score of not having declared such an obstruction to be a nuisance and punishing the same by the imposition of a penalty. Upon examination, we find that in pursuance ¹⁹ of such authority an ordinance was passed many years ago, section 3 of which is as follows: "If any person shall place, or leave in any street, or public lane, or alley, of this city a wagon, cart, gig, sleigh, or other carriage without a horse or beast used for drawing the same attached thereto, or shall without lawful permission obstruct any open and public street, lane, or alley of this city, every person so offending shall forfeit and pay a fine of two dollars": City Code, 472. It cannot be pretended that those persons engaged in the sport of coasting at the time mentioned in the declaration or at any time previously thereto, could not have been arrested, tried, convicted, and punished for a violation of said ordinance, so that the contention of the counsel of the defendant in error in this regard is not true in fact. Therefore, in any view of the case, the only neglect of duty was the failure of the city constables to abate or suppress the nuisance complained of in the declaration, which, as we have

already shown, involves no municipal liability. The court is, therefore, of the opinion that the judgment of the court below should be reversed.

MUNICIPAL CORPORATIONS—LIABILITY FOR NUISANCES IN STREETS—COASTING.—In some of the states, the liability of municipalities for injuries suffered in the public streets has been affirmed in exceptional cases, to which the application of well-settled legal principles ought to have led to a different result. Thus, where a city adopted an ordinance prohibiting, under penalty of a fine, sports in the public streets dangerous to life or property, it was held that the city might be answerable for injuries suffered by plaintiff while crossing a sidewalk, "inflicted by a sled on which a number of boys were coasting on the snow," unless it appeared that vigorous efforts were made to enforce the ordinance. But it is manifest that the enforcement of an ordinance of this character must depend on the skill and vigilance of the police; and as the city is never answerable for their negligence or inaction, it ought not to be held liable for their not enforcing its ordinance against coasting: See monographic note to *Goddard v. Harpswell*, 30 Am. St. Rep. 385, 386; note to *Robinson v. Greenville*, 51 Am. Rep. 860, 861, on coasting in streets. That a city is not answerable for not suppressing such practice, see *Shultz v. Milwaukee*, 49 Wis. 254; 35 Am. Rep. 779; *Pierce v. New Bedford*, 129 Mass. 534; 37 Am. Rep. 387; *Faulkner v. Aurora*, 85 Ind. 130; 44 Am. Rep. 1.

MUNICIPAL CORPORATIONS—LIABILITY FOR NONPERFORMANCE OF PUBLIC DUTY.—In one thing the authorities all unite, and that is, in affirming that no recovery can in any event be had where the negligence of the municipal corporation consists in failing to perform a legislative, judicial, or discretionary duty, or in simply performing such a duty in an improper method: See monographic note to *Goddard v. Harpswell*, 30 Am. St. Rep. 379; *Love v. Atlanta*, 95 Ga. 129; 51 Am. St. Rep. 64, and note; and *Cochrane v. Mayor*, 81 Md. 54; 48 Am. St. Rep. 479, and note.

DOVER GLASS WORKS COMPANY v. AMERICAN FIRE INSURANCE COMPANY.

[1 MARVEL (DEL.), 82.]

INSURANCE—RIGHTS OF PARTIES, HOW FIXED.—A policy of insurance, and the conditions therein, fix the relations between the parties thereto and furnish the measure of their respective rights and liabilities. Courts cannot go outside of such agreement of the parties to determine their mutual or reciprocal obligations.

INSURANCE—DEFINITION.—An insurance in relation to property is a contract whereby the insurer becomes bound, for a definite consideration, to indemnify the insured against loss or damage to certain property named in the policy by reason of certain perils to which it may be exposed.

INSURANCE—CONDITIONS.—It is competent for an insurer to prescribe the terms and conditions upon which he will take a proposed risk, provided they are not illegal nor contrary to public

policy, and the acceptance of such conditions imposes upon the insured the duty of a substantial compliance therewith, and any neglect thereof in any material respect, unless waived or condoned, relieves the insurer from liability in case of loss, whether it can be traced to such neglect or not.

INSURANCE.—CONDITIONS OR CLAUSES inserted in a contract of insurance which induce caution as to the conduct of either party in respect to the subject matter thereof, are not repugnant to public policy, because anything that stimulates diligence and good faith between the contracting parties is highly promotive of the general as well as the individual good.

INSURANCE.—CONDITIONS PROHIBITING ENCUMBRANCES AND LEVIES upon insured property without the consent of the insurer, inserted in the policy and declaring it to be void in case of a breach thereof, are not only legal and conformable to public policy, but also reasonable and proper.

INSURANCE—CONDITION COMPELLING OPERATION OF INSURED ESTABLISHMENT.—A condition in a policy of fire insurance forbidding the cessation of the operation of the insured establishment without the consent of the insurer, is valid, reasonable, and proper.

INSURANCE—CONDITIONS CONCERNING WORKMEN IN INSURED ESTABLISHMENT.—An insurer has a right to stipulate in a policy of fire insurance for the care and supervision of skilled workmen necessarily employed in running the insured establishment during the customary working season, and to make his liability dependent upon the fulfillment thereof.

INSURANCE.—CONDITIONS OF FORFEITURE contained in an insurance policy are not favored, and these and like conditions are always construed strictly, so that a party claiming a forfeiture by reason of a violation thereof is not permitted to deprive the other party of the benefits of the right of indemnity for which he contracted if there is any doubt or uncertainty as to the terms of such conditions, the extent of their application, or the acts which constitute the alleged breach.

INSURANCE—CONDITIONS AGAINST ENCUMBRANCES. Conditions in a fire insurance policy prohibiting encumbrances and levies without the consent of the insurer, and declaring the policy to be void in case of a breach thereof, apply only to voluntary liens and levies, and not to involuntary encumbrances; such as tax liens and judgments procured in invitum. The violation of such conditions does not render the policy absolutely void, but voidable only at the election of the insurer.

INSURANCE.—CONDITIONS OF AVOIDANCE contained in an insurance policy may be waived either by express agreement of the parties or necessary implication arising from their acts after notice of the breach.

INSURANCE—CONDITIONS AGAINST ENCUMBRANCES AND LEVIES—BREACH OF.—Under conditions in a policy of fire insurance prohibiting encumbrances and levies on the insured property without the consent of the insurer, and declaring the policy to be void in case of a breach thereof, the act of the insured in giving mortgages, confessing judgments, and suffering levies of execution against the insured property without the consent or waiver of the insurer, constitutes a breach of such conditions and avoids the policy at the election of the insurer.

INSURANCE—CONDITION PROHIBITING CESSATION OF OPERATION OF INSURED PROPERTY.—A condition in a fire insurance policy forbidding the cessation of the operation of the

insured establishment, without the consent of the insurer, and providing for the care and supervision of the workmen, and also providing that a breach of such condition shall avoid the policy, is broken, and the insurance terminated, when the business is discontinued and the operation of the establishment has ceased without the consent of the insurer, although watchmen are provided and kept in the establishment continually until the fire and loss occur.

E. Ridgely and C. H. B. Day, for the plaintiff.

G. H. Bates, for the defendant.

⁴¹ WOLCOTT, C. An action of covenant was brought on an insurance policy in the superior court of the state of Delaware in and for Kent county, by the plaintiff against the defendant, being No. 55 to the October term, 1889, and pleaded to issue. On the twenty-seventh day of April, 1892, at the April term of said court, a case stated was agreed upon by counsel, and filed, and an order made directing that all the questions of law contained therein should be reserved to be heard before all the judges.

The defendant issued to the plaintiff a policy of insurance, bearing date July 7, A. D. 1884, covering certain real and personal properties situated on the southwest corner of William street and the Delaware Railroad, near the town of Dover, Delaware, owned and used by the plaintiff for the manufacture of glass. By the terms of the policy, the defendant, in consideration of the representations of the assured, and the conditions and limitations therein mentioned, and of \$39.38 (the premiums), did insure the plaintiff against loss or damage by fire, to an amount not exceeding \$2,250 for one year—from 12 o'clock noon of said date to 12 o'clock noon July 7, A. D. 1885. The conditions to which said insurance was expressly made subject, and which are material to this case are as follows: "Or if, during the existence of this policy, or any renewal thereof, the risk shall be increased by any means whatever, with the knowledge of the assured, and the assured shall neglect to notify this company thereof, and have the same indorsed hereon, paying therefor such additional premium as shall be demanded, or shall allow the building herein covered to become vacant and unoccupied, . . . or shall sell or transfer the property herein insured, or encumber the same, without notice to ⁴² this company, indorsed hereon, . . . then and in every such case this policy shall be null and void."

"If the property hereby covered shall be levied upon or taken into possession or custody under any proceeding in law or equity,

... or if it be a manufacturing establishment running, in whole or in part, over or extra time, or running at night, or if it shall cease to be operated, without special agreement indorsed hereon, all insurance by this policy shall thereupon cease." Across the face of said policy was written the following: "10, 8, '84. Loss, if any, payable to Messrs. Manlove Hayes, C. S. Pennewill, David F. Burton, A. B. Richardson, and William Fisher, as their interests may appear. P. R. Burnett, Agent." On the back of said policy was indorsed the following: "For value received, the Dover Glass Works Company does hereby transfer, assign, and set over unto Caleb S. Pennewill and his assigns all its title and interest in the policy, and all advantage derived therefrom. Witness the hand of Caleb S. Pennewill, President of the Dover Glass Works Company, and the corporate seal, this third day of October, 1888. Caleb S. Pennewill, President of the Dover Glass Works Company. Sealed and delivered in the presence of C. H. B. Day." This insurance was duly renewed from year to year and dated, respectively, July 7, 1885, 1886, 1887, and 1888, the last of which extended the term of the policy to and until July 7, 1889.

A judgment for the real debt of \$1,718.67, by confession was obtained by Hazel & Pennewill against the plaintiff in the said superior court, being No. 197 to the April term, A. D. 1888, of said court, on which a writ of fieri facias was duly issued, being No. 106 to the October term of said court. The time of the entry or confession of said judgment was September 8, A. D. 1888, at 9 o'clock A. M. On said writ the sheriff made the following return: "Sheriff returns levied on goods and chattels as per inventory and appraisement annexed and afterward, to wit, on the eighteenth day of September, A. D. 1888, goods and chattels offered for sale at public vendue, were not sold because the bidders to whom the same were struck off refused to pay for the same and would not ⁴⁸ comply with the terms of the sale, except a lot of old iron to — Shehan for the sum of two dollars and ten cents (\$2.10), which sum I have applied to this writ and not sufficient." Another judgment for the real debt of \$5,000 by confession, was obtained by Caleb S. Pennewill and others against the plaintiff in said superior court, being No. 198 to the April term, A. D. 1888, of said court, on which a writ of fieri facias was issued, being No. 107 to the October term of said court. The time of the entry or confession of said judgment was September 8, A. D. 1888, at 9:05 o'clock A. M. On said writ the sheriff made a return similar to the one made on the

first-named writ, except that the money realized on the sale of goods and chattels levied on was applied to a prior writ. Under said writ of fieri facias, the personal property of the plaintiff covered by the insurance was levied on according to the laws and practice of this state, but the same was not removed from the building or taken into the actual possession of the sheriff, but remained in the custody of watchmen until its destruction by fire on the first day of October, A. D. 1888. After the 18th of September, 1888, the business previously carried on in the said insured property was discontinued and the said property ceased to be occupied as a manufacturing establishment. A mortgage embracing the real estate covered by the insurance was made and delivered by the plaintiff to Caleb S. Pennewill and others, bearing date September 6, A. D. 1888, for the real debt of \$5,000, which was immediately thereafter recorded in the proper office at Dover. Upon a scire facias thereon, judgment was obtained in said superior court, being No. 28 to the October term, A. D. 1888, of said court, on which there was issued a writ of levari facias, being No. 109 to the October term, A. D. 1888, under which the sheriff returned that, after due notice given as by law required, he did, on the second day of October, A. D. 1888, at 2 o'clock P. M., sell the lands and premises mentioned and described in said writ to Alden B. Richardson, David F. Burton, William Fisher, and Caleb S. Pennewill for the sum of \$2,500, and applied the same to the first ⁴⁴ judgment hereinafter named. In addition to the above judgments and mortgage, and prior to any of them, were the following liens against the plaintiff upon the insured property: A mortgage to Manlove Hayes and others for \$8,000, dated December 8, 1884. A judgment on bond accompanying said mortgage and for same debt, being No. 63 to October term, A. D. 1884, of said superior court, said judgment and mortgage being in lieu of a prior mortgage dated October 8, 1884, of which notice had been given to Burnett, then the agent of the defendant at Dover, as shown by indorsement on the face of the policy; loss, if any, payable to the persons named as mortgagees. A mortgage to David F. Burton and others for the real debt of \$27,000, interest from December 12, 1885, recorded September 16, 1885. Judgment on bond accompanying last-mentioned mortgage No. 196, April term, 1888.

On the fifth day of October, A. D. 1888, certain portions of the real and personal properties insured were consumed by fire, of which the defendant had due notice. The amount of the loss is agreed to be \$900, apportioned as follows: \$600 on the

real and \$300 on the personal estate. No special agreement with reference to the conditions to which the insurance was made subject was indorsed on said policy, nor any notice given by the plaintiff to the defendant of executions and the proceedings thereon, or of the fact that the property had ceased to be operated as a manufacturing establishment. The defendant denies the right of the plaintiff to recover any part of the amount claimed, upon the ground that the conditions, in regard to encumbering and levying upon the property covered by the policy of insurance and the operation of the establishment were violated. The policy and the conditions therein define or fix the relations between the parties thereto and furnish the measure of their respective rights and liabilities. Courts cannot go outside of the agreements of parties to determine their mutual or reciprocal obligations. To do so would have the effect of imposing terms to which they had not assented, or absolving them from duties which they had voluntarily assumed. It is the province of courts to interpret, and not to make, ⁴⁵ contracts—to ascertain the legal import of the language employed by the parties themselves to express their agreements and not to add to or take from in order to make ideal contracts. Courts are sometimes helpless to prevent the consummation of that which is manifestly unjust, because the party seeking protection incautiously stepped into the snare prepared by the cunning hand of his adversary. The only aid that they can render in dealing with a one-sided and oppressive contract is to resolve every doubt that may arise during the course of the trial in favor of the party upon whom it may bear the hardest. Hard cases are quicksands of the law, of the dangers of which courts have been admonished by oft-repeated experiences. To set about to relieve against the consequences of what may be considered sharp and improvident bargains would inevitably lead to great uncertainty and confusion in the administration of justice. It is needless to describe the effect of such a condition of things in order to appreciate the necessity of avoiding it.

With these elementary principles in view, let us proceed now to examine the contract which is the cause of action in this case, and the relation of the parties as determined by their conduct in regard to the subject-matter thereof. An insurance in relation to property is a contract whereby the insurer becomes bound, for a definite consideration, to indemnify the insured against loss or damage to certain property named in the policy, by reason of certain perils to which it may be exposed. It is com-

petent for the insurer to prescribe the terms and conditions upon which it will take the proposed risk, provided they are not illegal nor contrary to public policy. The acceptance of these conditions consequently imposes upon the insured the duty of a substantial compliance therewith, and any neglect thereof in any material respect, unless waived or condoned, will relieve the insurer from liability in case of loss, whether it can be traced to such neglect or not. One reason for this is, that he has, by agreeing to the terms upon which the insurance was made, shut the door against any inquiry as to the cause of the loss. Another and a more general reason is, that ⁴⁶ when a right and a duty springing from a contract are united in one of the parties thereto, he must show a performance of the one before he can assert the other. Are the conditions referred to illegal or contrary to public policy? They are neither. They are not forbidden by any legal precept, either written or unwritten. Certainly, clauses or conditions inserted in a contract, which induce caution as to conduct of either party in respect to the subject matter thereof, cannot be held as being repugnant to any of the rules and maxims relating to the broad subject of public policy, because anything that stimulates diligence and good faith between contracting parties is highly promotive of the general, as well as the individual, good. The tendency of such limitations upon the liabilities of insurance companies is to diminish the needless destruction of property, and obviate the necessity of increasing the rates of insurance to a point where they are intolerable, in order to cover the disbursements made to unworthy and dishonest persons. The increased cost of insurance, it must be admitted, is due in part to the increased risk occasioned by the fraud or neglect of a certain class of people owning insured property. The good have to suffer for the conduct of the bad. The honest and careful portion of every community have to pay for the carelessness and malafides of their imprudent and evil-minded neighbors. Those who insure, as the plaintiff in this case did, for protection against unavoidable loss and accident, can well afford to submit to the requirements of the most rigid conditions for the sake of curtailing losses which are the result either of gross neglect or the torch of the incendiary. The condition prohibiting encumbrances and levies without the consent of the defendant, declaring the policy to be void in case of a breach thereof, is not only legal and conformable to public policy, but reasonable and proper. When we consider the circumstances and business methods of not a few men, and the motives that influ-

ence them in regard to their financial affairs, the object of such conditions becomes quite manifest. So long as the insured property remains in a condition in which its preservation is of more interest to the owner than its destruction, there is no inducement to court or ⁴⁷ invite the peril against which it is protected by the insurance. The substantial interest which the insured has in the property is on the side of care and diligence, and operates as a guaranty of good faith in his conduct. But when it becomes encumbered to such an extent that the encumbrances are equal to or in excess of its value, the motive to caution and vigilance ceases. To protect against just such a contingency as this, such conditions are incorporated in nearly if not all policies of modern date. The condition forbidding the cessation of the operation of the establishment without the consent of the company is also reasonable and proper. The company had a right to stipulate for the care and supervision of skilled workmen necessarily employed in running the concern during the customary working season, and to make their liability dependent upon the fulfillment thereof. The conditions and circumstances that existed at the time the insurance was effected may have been one of the considerations that influenced the company in determining to take the risk. To provide, therefore, for their continuance or preservation was entirely consistent with the conduct of a prudent and reasonable man. Now, as forfeitures are not favored, these and similar conditions are always construed strictly, so that the party claiming a forfeiture by reason of a violation thereof will not be permitted to deprive the other party of the benefits of the right to indemnity for which he contracted, if there is any doubt or uncertainty as to the terms of such conditions, the extent of their application, or the acts which constitute the alleged breach. Freedom from ambiguity in both these respects is absolutely essential to the maintenance of a plea in bar in an action to recover a loss covered by the policy in which such causes are contained.

As the rights of the insurer, then, under the conditions in regard to liens, are *strictissimi juris*, they cannot be held to apply to involuntary encumbrances, such as tax liens and judgments procured in invitum, because the insured cannot control the action of the government or his creditors, either as to time or place, within the limits of the law. To sanction the forfeiture of a right upon ⁴⁸ failure to communicate notice of an event of which the insured could have no knowledge would shock the dullest sense of justice. They must, therefore, be restricted to volun-

tary encumbrances in this and similar cases. According to the same rule of construction, neither does the violation of the conditions which we are now considering render the policy absolutely void, but voidable only at the election of the insurer. That being so, the right of avoidance may be waived either by express agreement or necessary implication arising from the acts of the parties after notice of the breach. The clauses in the policy which I have said operate as a restriction upon the liability of the defendant are conditions precedent and subject to the principles limiting their force and application, and, when unperformed, stand as an effectual barrier against the plaintiff's right to recover.

Let us now consider the facts in relation to these conditions. That the plaintiff gave mortgages and confessed judgments that bound all its real estate without first having obtained consent of the defendant thereto, and that no express agreement was ever made waiving the effect thereof upon the policy as a subsisting contract, are not disputed; neither is it denied that the contract against encumbrances is valid or that the creation of such liens constitutes a breach of the same. The counsel for the plaintiff insists only upon a strict adherence to the rule which requires a resolution of all doubts, whenever they arise, in favor of the plaintiff, and that the acts of the defendant should be construed into a waiver of the forfeiture and a recognition of the plaintiff's right to recover. As to the first proposition, the court assents. As to the other, it cannot to the extent claimed. Suppose we concede that the defendant, by its act, did waive any cause of forfeiture on account of any encumbrance created prior to July 7, 1888, the date of the last renewal of the policy; yet it nowhere appears in the statement of facts that the defendant had any notice of the judgment in favor of Hazel & Pennewill for \$1,718.67, nor of the one in favor of Caleb S. Pennewill et al. for \$5,000, obtained by confession against the plaintiff September 7th and 8th respectively, nor of the mortgages collateral ⁴⁹ to the last-named judgment, recorded contemporaneously therewith; and, if it had, it does not appear that it did any act which, by necessary implication, estops it from setting up the violation of such condition in the manner stated as a defense in this suit. It follows, then, that no loss occasioned by the destruction of the real property can be recovered under this policy.

The reason assigned for avoiding the insurance on the realty might be adopted as a sufficient reason for avoiding the insurance on the personalty; but as the plaintiff's counsel insisted with so

much earnestness and ability that the levies made on the personal property did not amount to a breach of the prohibition in regard to the same, as they did not involve the removal of it from the possession of the plaintiff, it is proper that serious thought should be given to their contention. The clause under which it is made is as follows: "If the property hereby covered shall be levied upon or taken into possession or custody under any proceeding in law or equity . . . all insurance upon this policy shall thereupon cease." The supreme court of the state of Pennsylvania, in the case of Commonwealth Ins. Co. v. Berger, 42 Pa. St. 285, 82 Am. Dec. 504, decided that a levy made without the removal of the property from the possession of the owner, under a condition in the policy expressed in language precisely like the one herein referred to, would not avoid the insurance. This case is cited as conclusive. The opinion of the court proceeds upon the idea that the phrases "levied upon" and "taken into possession or custody" are exact equivalents, the latter being used to explain and limit the former; that is, the phrase "taken into possession or custody" is employed to restrict the phrase "levied upon" to an actual seizure of the property and dispossession of the owners, according to the common-law method of making a levy. A levy evidenced by a mere memorandum or inventory and appraisement of the property intended to be levied upon, or a constructive seizure thereof only, was not, therefore, a violation of the condition. The reasoning of the learned judge who delivered the opinion in this case would be very sound and unassailable if there were not other words connected with the ⁵⁰ latter alternative to give it a broader and a different significance. In the formation of his premises they seem to escape his attention. When we take into consideration the entire phrase "taken into possession or custody by any proceeding in law or equity," the equivalence between it and the phrase "levied upon" disappears. It means more than a levy. The idea of the term "levy" includes a constructive, as well as an actual, taking into possession of property under execution process. Now, as the alternative expression refers to some other mode of taking property into custody than by levy, namely, by any legal or equitable proceeding, it follows that the phrase "levied upon" cannot mean the same as the phrase "taken into possession or custody by any proceeding in law or equity." No doubt the latter was intended to cover a seizure of property by attachment process, sequestration, or other modes not present in the mind of the draughtsman. It certainly never was intended as a means of interpreting, explain-

ing, or limiting the words "levied on" because it contemplated a mode of taking property that is entirely foreign to the office of a levy. This interpretation of the condition in question we think is warranted by the natural construction of the language in which it is expressed. If so, the act of the plaintiff in deliberately suffering levies to be made on its personal property evidently avoids the insurance thereon. But, if it were held to be otherwise, then the ceasing to operate the establishment, contrary to the general condition of the policy in that regard, will certainly absolve the defendant from any liability thereunder. This, as before observed, is a general condition which relates to all the property embraced in the policy. The condition is as follows: "If it [meaning the factory] shall cease to be operated without special agreement indorsed hereon, all insurance by this policy shall thereupon cease." In the statement of facts it is admitted that after the attempted sale of the personal property, to wit, on the eighteenth day of September, 1888, the business which had been previously carried on in the building was discontinued and the establishment ceased to be operated for manufacturing purposes, and it nowhere appears in said statement of facts that this ⁵¹ defendant either consented to such cessation of business or waived its effects.

It is also stated that the plaintiff provided watchmen who were in the buildings day and night until the fire occurred, October 1, 1888. But did this answer the demands of the condition? The defendant, as we have before said, stipulated in that condition for the care and supervision of the workmen, and a substitution of watchmen for them was not a compliance with the terms of the contract. And though the risk may not have been changed or increased by such a substitution, yet the defendant has a right to insist upon the fulfillment of the contract as the ground of its liability for the loss. The plaintiff contends that the ceasing to operate the establishment did not affect the liability of the defendant because its risk thereby was not increased. The case of *Lattomus v. Farmers' etc. Ins. Co.*, 3 Houst. 404, is referred to in support of such contention. That case is entirely different from the case at bar. The facts were that *Lattomus* obtained an insurance on a stock of goods in a storehouse in the town of Clayton. The company had a by-law which is in these words: "When the risk has been changed, either within itself or by the surrounding or adjacent buildings, it shall be incumbent on the insured to make the proper representations to the nearest agent, and have the same corrected or adjusted, and

manifested in writing, by the secretary; otherwise, the company will not be responsible." The by-law was treated as a part of the contract of insurance. The defendant alleged that the plaintiff erected a shed adjoining the store which contained the stock of goods, and insisted that that was a violation of the contract. The court in that case properly charged that, if the erection of the shed adjacent to the store increased the risk of the defendant, the plaintiff could not recover, but that, if it did not increase the risk, he could recover. This language of the court in that case was in accordance with the terms of the contract, which made an increase of risk the test of the defendant's responsibility. It could not have been otherwise. But in the present case the liability of the defendant is not based ⁵² upon the contingency as to whether a violation of the contract increased the risk of the underwriter or not. It was agreed by both parties that the ceasing to operate the concern should per se be a cause of forfeiture. The unanimous opinion of the judges is, that the plaintiff in this case cannot recover the loss occasioned by the destruction of either personal or real property covered by the insurance.

Let a certificate in accordance with this opinion be drawn up and transmitted to the superior court in and for New Castle county.

INSURANCE—FORCE AND CONSTRUCTION OF CONTRACT. The rights of both the insurer and the insured are governed by the contract of insurance. If it is susceptible of two constructions, that one will be adopted which is more favorable to the assured; but if its language is clear and unambiguous, its effect cannot be destroyed by construction: *German Ins. Co. v. Hayden*, 21 Colo. 127; 52 Am. St. Rep. 206, and note. Conditions of forfeiture will be construed strictly against the insurer and in favor of the insured: *Snyder v. Dwelling-House Ins. Co.*, 59 N. J. L. 544; 59 Am. St. Rep. 625, and note; *Goodwin v. Provident etc. Life Assur. Assn.*, 97 Iowa, 228; 59 Am. St. Rep. 411, and note; but construction must not make a new contract for the parties: *Schuermann v. Dwelling-House Ins. Co.*, 161 Ill. 437; 52 Am. St. Rep. 377.

INSURANCE—CONDITION AGAINST ENCUMBRANCES.—Where a policy of insurance contains a provision that "if the property shall hereafter become mortgaged or encumbered, this policy shall be null and void," this provision will be regarded as relating only to liens voluntarily placed upon the property by the assured, and not as applying to judgments or other liens created by law: *Phenix Ins. Co. v. Pickel*, 119 Ind. 155; 12 Am. St. Rep. 393, and note. That such a condition is reasonable and valid: *Olney v. German Ins. Co.*, 88 Mich. 94; 28 Am. St. Rep. 281.

INSURANCE—CONDITION AGAINST CEASING TO OPERATE INSURED ESTABLISHMENT.—The temporary closing of an insured mill for forty-two days without notice to the insurers, when such closing is caused by want of logs to manufacture, such logs

being daily expected, but detained by low water, is not such "ceasing to operate" as will avoid a policy conditioned to become void if "the mill shall cease to be operated" without notice to or consent of the insurers: *City Planing etc. Co. v. Merchants' etc. Ins. Co.*, 72 Mich. 654; 16 Am. St. Rep. 552, and note. See, also, *Poss v. Western Assur. Co.*, 7 Lea, 704; 40 Am. Rep. 68. See monographic note to *Moore v. Phoenix Ins. Co.*, 10 Am. St. Rep. 390-306.

CASES
IN THE
SUPREME COURT
OF
GEORGIA.

POWELL v. STATE.

[101 GEORGIA, 9.]

HOMICIDE—PROOF OF CHARACTER.—Except when special facts may have been shown to have existed in a particular case, evidence of character, conduct, or utterances of the deceased is not admissible in trials for homicide.

HOMICIDE—PROOF OF CHARACTER.—In a trial for homicide, where the plea of self-defense is set up, evidence of the character of the deceased for violence must be confined to evidence of his general character and reputation, and this cannot be established by proof of specific acts.

HOMICIDE—EVIDENCE OF CHARACTER.—If, on a trial for homicide, the character of the deceased for peace or violence is in issue, the testimony of a witness to the general character of the deceased cannot be confined to evidence of what is generally said in reference thereto. It is competent to show by a witness who has lived in the same community with the deceased, that he knows the estimation in which he was held by the people, and that he has never heard the character of such person questioned. Such evidence authorizes the inference that such character was good.

HOMICIDE—DECLARATIONS OF ACCUSED AS EVIDENCE.—On a trial for murder, where self-defense is set up, declarations of present pain made by the accused soon after the killing, and alleged by him to have been caused by an attack made by the deceased at the time of the killing, are admissible in evidence to be considered by the jury along with the other facts in the case.

TRIAL—DISCRETION IN REOPENING CASE.—The question of reopening a case at any stage of the proceedings, to let in additional testimony, is largely in the discretion of the trial court, which cannot be reviewed on appeal unless a gross abuse of such discretion is shown.

MURDER—DECLARATIONS AS EVIDENCE—INSTRUCTIONS.—A declaration made by one charged with murder admitting the homicide, but disavowing any criminal responsibility therefor, though admissible in evidence as an admission of a fact, is not a confession of guilt, and does not authorize instructions on the law of confessions.

WITNESSES—IMPEACHMENT.—If a witness has been impeached, it is the duty of the jury to disregard his testimony, unless it is corroborated in material particulars.

WITNESSES—IMPEACHMENT.—If the credibility of a witness is attacked by an effort to impeach him by legal methods, the jury become the triers of the credibility of the witness sought to be impeached, and of the witnesses by whose testimony the attack is made. They are to weigh the opposing testimony, and at last say whether or not in their judgment the witness has been impeached.

HOMICIDE—INSTRUCTIONS.—If, on a trial for murder, the accused pleads self-defense, and the court, after instructing the jury as to all grades of homicide, in conclusion instructs the jury to "look to all the facts and circumstances surrounding and connected with the case; if you find that the defendant and deceased had a difficulty, look to all the facts and circumstances surrounding and connected with it; see whether or not it was necessary for the defendant to take the life of the deceased in order to save his own life. Before he would be justified and you would be authorized to find him guilty of no offense, you must believe from the evidence that it was necessary for him to take the life of the deceased in order to save his own life," such instruction is erroneous in that it excludes from the consideration of the jury the question whether the accused killed the deceased to prevent a felony being committed on his person.

HOMICIDE—JUSTIFICATION.—A homicide committed in self-defense, or in defense of habitation, property, or person, against one who manifestly intends or endeavors, by violence or surprise, to commit a felony on either, is justifiable homicide.

Indictment for murder and conviction of voluntary manslaughter. A motion for a new trial was overruled, and the accused excepted and prosecuted a writ of error to the supreme court.

D. M. Roberts, E. Herrman, Hardeman, Davis & Turner, and E. H. Williams, for the plaintiff in error.

J. M. Terrell, attorney general, T. Eason, solicitor general, H. Lawson, D. B. Nicholson, and J. H. Martin, for the state.

¹⁶ **LITTLE, J.** A number of grounds are set out in the motion for a new trial, which was overruled. Inasmuch, however, as the case goes back for another trial, we purposely omit consideration of such of them as we do not deem material to be decided for the purposes of another hearing.

1. The first six grounds of the amended motion are based on the rulings of the court where witnesses were introduced by the defendant to show the character of the deceased for violence. Without going into the details of the rulings set out in these several exceptions, it is sufficient here to say that, except when special facts may have been shown to have existed in a particular case, proof of character, conduct, or utterances of the deceased is not admissible in evidence in trials for homicide, because

neither of them will ordinarily justify or extenuate the killing: 2 Bishop's Criminal Procedure, sec. 609. In the class of cases, however, where the defendant rests his defense on the claim that he acted in self defense, the particulars and details of his action become material, because the law judges him by the necessity for his action as it truly appeared to him, and he may then legally give in evidence such things known to him of the character, prior conduct, or threats of the person with whom he was contending as may justly be considered as affecting his action which brought about the homicide, and as well of "a generally known evil trait of a sort which might properly influence his conduct, as that the attacking person was in character quarrelsome and dangerous": 2 Bishop's Criminal Procedure, secs. 610, 613; Doyal v. State, 70 Ga. 134. Such evidence must, however, be confined to the general reputation of the deceased, and this cannot be established by proof of specific acts: Doyal v. State, 70 Ga. 134.

¹⁷ It is not proper, in such examinations, when the question of the character of the deceased for peace or violence is in issue, to confine the testimony of the witness, in establishing general reputation, to proof of what is generally said in reference to the same. It is competent to show by a witness who lives in the same community with the person whose character is in issue, that he knows the estimation in which he is held by the people, and that he has never heard the character of such person questioned. If a witness called to prove the character of another were confined alone to the question as to what people said about a given person, such evidence would not in all cases tend to show the true standing of the person inquired about. If nothing has been said in the community in which a man lives against his honesty and integrity, if it has never in any way been called in question, it would hardly be fair or reasonable to conclude that, because such questions had never been raised, the person inquired about had not any established character for such virtues. On the contrary, proof of the fact that no question had ever been raised against him in this regard authorizes the inference that the character is good. What people in the neighborhood generally say is a fundamental source of inquiry by which character may be established; but if the witness is prepared to testify that he has never heard the character of the deceased for peaceableness questioned; that he has lived in the same community with him for any considerable length of time and has mingled with persons who knew him, it is competent evidence; and the result

of such testimony is to show that the witness did in fact sufficiently know the general character of the person inquired about to entitle him to testify in relation thereto: *Flemister v. State*, 81 Ga. 768; *Hodgkins v. State*, 89 Ga. 761.

2. The seventh and eighth grounds of the motion for new trial assign as error the refusal of the presiding judge to admit in evidence testimony that the defendant complained of his throat being sore, the witness having previously testified that he had seen marks like finger-prints on the side of the defendant's neck, and the theory of the defendant's case being that the deceased attempted to commit a felony on his person by ¹⁸ choking him at the time he shot the deceased. Complaints of pain made by the defendant, under such circumstances, are admissible: *Atlanta etc. R. R. Co. v. Walker*, 93 Ga. 467; *Broyles v. Prisock*, 97 Ga. 643; 1 *Greenleaf on Evidence*, sec. 102. What probative value such evidence, when admitted, may have must vary according to the circumstances of each case. It may amount to very little, or, indeed, have no weight as affecting the result of the trial, or there may exist circumstances under which it would have a greater value. But, in any event, what value is to be attached to it must be left to the determination of the jury charged with the ascertainment of the truth of the accusation made, and it comes to them as any other fact as part of the history of the case.

3. The twelfth ground of the motion alleges error in the ruling of the court by which the case was reopened and new evidence introduced after the same had been closed and the defendant's witnesses discharged. Under the repeated rulings of this court, being so general as to need no citation, the question of reopening a case at any particular stage of the proceedings to let in additional testimony is largely in the discretion of the court and must necessarily be so; and we are not prepared to say that the court abused his discretion in the present instance.

4. The court charged the jury the law in relation to confessions. The foundation for this charge is to be found alone in a statement testified to by witness Homer Adams, which was to the effect that he saw the prisoner after the killing in the courthouse at Rochelle and heard him speak in relation to the killing as follows: "He said that his conscience did not bother him any more about killing Reid than if he had killed a damned dog. He said he was sorry for his wife and on Reid's wife's account." In opening his charge to the jury, the court instructed them that the defendant admitted the shooting, but insisted that it

was done under circumstances of justification. The whole evidence and statement of the prisoner show that the question of whether the defendant did the shooting was not the real issue. The words used by the defendant, according to the statement of the witness, were in no sense a confession of guilt. They constitute certainly a criminating admission ¹⁹ that he killed Reid. Further than this, the words tended to deny guilt in the commission of the act, in that his conscience justified the act. As a criminating admission against him his statement was admissible in evidence; but the court, in charging the jury, overlooked the distinction between confessions of guilt and admissions of mere evidentiary facts not inconsistent with innocence, and accordingly erred in treating the statement as a sufficient basis for giving in charge to the jury the law relating to confessions: *Dumas v. State*, 63 Ga. 600; *Fletcher v. State*, 90 Ga. 468; *Nightengale v. State*, 94 Ga. 395.

5. In the twentieth ground of the motion for new trial it is urged that the court erred in its charge to the jury in relation to the impeachment of witnesses. The charge complained of is in the language following: "I charge you that a witness may be impeached by proof of contradictory statements; and if you believe that any witness has been successfully impeached, why then it would be your duty to discard the evidence of such witness, but it is for you to say whether or not you will believe the witness sought to be impeached, or the witness brought to impeach him; the credibility of all witnesses being for you and your consideration. If you believe that any witness has been successfully impeached in reference to contradictory statements upon some material issue in the case, and it must be some material issue in the case, then you would not be authorized to believe him, unless you find that he has been corroborated. He may be corroborated, or he may be sustained by proof of good character, or by other facts and circumstances in the case." The proposition is laid down in 2 Thompson on Trials, section 2426, that the trial judge, in cautioning the jury in respect of the testimony of witnesses sought to be impeached, may instruct them that, "in determining the guilt or innocence of the defendant, they are to consider the entire evidence in the case, but they are at liberty to disregard the statements of such witnesses (if any there be) as have been successfully impeached, either by direct contradiction or by proof of general bad character, unless the statements of such witnesses have been corroborated by other evidence which has not been impeached": See also *Miller v. People*,

39 Ill. ²⁰ 463; Harper v. State, 101 Ind. 109; State v. Ormiston, 66 Iowa, 152; Haymond v. Saucer, 84 Ind. 12. The jury are the exclusive and sole judges of the credibility of all witnesses: Merchants' etc. Bank v. Trustees, 62 Ga. 271; Walker v. State, 72 Ga. 200; White v. Hammond, 79 Ga. 182; Cleghorn v. Janes, 68 Ga. 87. Therefore, when the credibility of a witness is attacked as by an effort to impeach him in any of the methods pointed out by law, the jury then become the triers of the credibility of the witness sought to be impeached, and of the witness or witnesses by whose testimony the attack is made; they are to weigh the opposing testimony, and at last say whether they will discredit the testimony of the witness sought to be impeached, and consequently give credit to that introduced by way of impeachment, or whether they will discredit the testimony introduced for the purpose of impeachment and credit that of the witness attacked; in a word, it is the exclusive province of the jury, under all the attendant circumstances and conditions, to determine whether a witness has or has not been impeached: McPherson v. State, 22 Ga. 479; Strozier v. Carroll, 31 Ga. 557; Western etc. R. R. v. Carlton, 28 Ga. 180; Fish v. Van Winkle, 34 Ga. 339; Shorter v. Marshall, 49 Ga. 31; Williams v. State, 69 Ga. 14; Franklin v. State, 69 Ga. 37; 47 Am. Rep. 748; Ford v. State, 70 Ga. 722; Saul v. Buck, 72 Ga. 254; Hodgkins v. State, 89 Ga. 761; Lewis v. State, 91 Ga. 168; McTyier v. State, 91 Ga. 255; Rome R. R. Co. v. Barnett, 94 Ga. 447; Central R. R. etc. Co. v. Phinazee, 93 Ga. 488; Duncan v. State, 97 Ga. 180.

Some confusion seems to have arisen in the application of this doctrine, by reason of a failure, in applying it, to keep in mind the distinction between the impeachment of a witness and the attempt to impeach, and as to the duty of the jury in dealing with the testimony of an impeached witness, and that of a witness whose credibility has been attacked by way of impeachment, the terms "impeachment" and "attack on the credibility" of a witness by way of impeachment, being treated as synonymous. It is a solecism to say that a witness has been successfully impeached. It is altogether proper to say that an attempt to impeach the credibility of a witness has proved successful. Impeachment, in evidence, is "an allegation, ²¹ supported by proof, that a witness who has been examined, is unworthy of credit": 1 Bouvier's Law Dictionary, 774; to same effect see Black's Law Dictionary, 593. It is the allegation, supported by proof. By the latter author proof is defined to be "the logically sufficient reason for assenting to the truth of a proposition advanced":

Bouvier's Law Dictionary, 441. "Proof, in civil process, is a sufficient reason for the truth of a juridical proposition by which a party seeks either to maintain his own claim or to defeat the claim of another": Wharton on Evidence, sec. 1. "Proof is the effect of evidence; the establishment of a fact by evidence": Cal. Code Civ. Proc., sec. 1824. Ayliffe defines "juridical proof" to be a clear and evident declaration or demonstration of a matter which was before doubtful, conveyed in a judicial manner": Ayliffe's Parergon Juris Canonici Anglicani, 442. When a witness is impeached, his unworthiness of credit is absolutely established in the mind of the jury. The incautious use of the term "impeachment," and treating that term as synonymous with an attack upon the credibility of a witness by way of impeachment, as, for instance, in *McPherson v. State*, 22 Ga. 479, where this language is used: "Although a witness may be impeached, and may not afterward be corroborated, yet it must be a question for the jury whether he is not still to be believed, notwithstanding the impeachment"; and similar expressions to be found in *Western etc. R. R. Co. v. Carlton*, 28 Ga. 180, *Fish v. Van Winkle*, 34 Ga. 339, *Shorter v. Marshall*, 49 Ga. 31, *Franklyn v. State*, 69 Ga. 37, 47 Am. Rep. 748, 89 Ga. 765, have tended to suggest an apparent conflict between those cases holding that the jury "may believe an impeached witness, notwithstanding the impeachment," and those cases, as for instance, *Williams v. State*, 69 Ga. 14 (28), and *Saul v. Buck*, 72 Ga. 254, holding that if a witness has been "successfully" impeached, it is the duty of the jury to disregard or discard his testimony, unless corroborated. With reference to the use of the term "impeached" in the cases first above referred to, the observations of Mr. Justice Lumpkin, in the case of *Duncan v. State*, 97 Ga. 180, are applicable; which are to the effect, that by the use of the term "impeached" the court evidently referred to the attack which had been made upon the credibility of the witness or witnesses. He says: "It is more accurate, where one or more witnesses testify that another ²² witness is of bad character and therefore not to be believed, to say that the credibility of the latter has been attacked, or that an effort to impeach him has been made, rather than to say flatly that he has been impeached. The court would not be authorized to tell the jury in plain terms that any witness had been impeached, in the sense that he had been successfully discredited."

Tested by the previous rulings of this court, there is no error in the charge complained of. Properly interpreted, the charge

was an instruction to the jury that it was primarily a question for them whether any witness had or had not been impeached; that any witness sought to be impeached by proof of contradictory statements upon some material issue in the case might be sustained by proof of good character or by other facts and circumstances; that is, in determining the question of impeachment, they were to consider these things; and, lastly, the instruction that if the jury should determine any witness had been impeached, it would be their duty to disregard his testimony, was qualified by the further instruction that they would be so authorized, unless such witness had been corroborated.

6, 7. The twenty-second ground of the motion for new trial alleges that the court erred in the following charge to the jury: "Now look to all the facts and circumstances surrounding and connected with the case. If you find that the defendant and the deceased had a difficulty, look to all the facts and circumstances surrounding and connected with it. See whether or not it was necessary for the defendant to take the life of the deceased in order to save his own life. Before he would be justified and you would be authorized to find him guilty of no offense, you must believe from the evidence that it was necessary for him to take the life of the deceased in order to save his own life."

The defendant in this case admitted the killing, but insisted that he was justifiable in shooting the deceased at the time. The charge of the court was quite full, and in the main satisfactory as explanatory of the law of homicide. After charging the grades of murder and manslaughter, the court did ²³ charge the law of justifiable homicide as found in the Penal Code, section 70, and the effect of reasonable fear of the offenses designated in that section as provided in the succeeding section, and likewise charged the law of justifiable homicide as laid down in section 73 of the Penal Code. These charges were made before the particular charge complained of was given. The latter, notwithstanding the former part of the charge, might be construed to have been a general summary of the law of justifiable homicide occupying the concluding part of the charge on the subject of justifiable homicide. As an abstract proposition of law, the charge was error. As a proposition of law applicable to a certain class of cases, it was not error; but inasmuch as the defendant relied on justifiable homicide, this charge, purporting as it does to state the proposition that, in order for the act of the defendant to be justifiable, it must be shown that it was necessary for the defendant to take the life of the deceased in order to

save his own life, does not correctly state the law of justifiable homicide. The two sections of the Penal Code, 70, 73, are parts of the common law. Sir William Blackstone, in the fourth book of his Commentaries, top pages 134-137, in treating of justifiable homicide, uses this language: "In some cases homicide is justifiable, rather by the permission than by the absolute command of the law, either for the advancement of public justice, or in such instances where it is committed for the prevention of some atrocious crime." This is true "by the law of nature, and also by the law of England, as it stood so early as the time of Bracton, and as it is since declared in statute 24 Henry VIII, chapter 5 (5)." Further on, the same author, top pages 138, 139, treating of excusable homicide, declares that "homicide in self-defense, or *se defendendo*, upon a sudden affray, is also excusable, rather than justifiable, by the English law"; and is that "whereby a man may protect himself from an assault or the like in the course of a sudden broil or quarrel, by killing him who assaults him. And this is what the law expresses by the word *chance-medley*. . . . It is frequently difficult to distinguish this species of homicide . . . from that of manslaughter. . . . But the true criterion between them seems ²⁴ to be this: when both parties are actually combating at the time when the mortal stroke is given, the slayer is then guilty of manslaughter; but if the slayer has not begun the fight, or (having begun) endeavors to decline any further struggle, and afterward, being closely pressed by his antagonist, kills him to avoid his own destruction, this is homicide excusable by self-defense." Sir Matthew Hale, in his Pleas of the Crown, chapter 40, makes and preserves the same distinctions. Later common-law writers, Russell, Chitty, Wharton, Bishop, and all others, so far as we have investigated, draw the same distinctions, from which it is evident that the compilers of our Penal Code, in the separation of these two classes of homicide, meant to continue the distinctions which existed at common law and which were there denominated, respectively, *se et sua defendendo* and *se defendendo* as applicable to two different classes of homicide. As the effect of a homicide *se defendendo* and *se et sua defendendo* was in law the same, the statute, while preserving the distinction as to the facts which would justify the one and excuse the other, abolished the common-law classification of excusable and justifiable homicide. This doctrine is not a new one in our criminal jurisprudence, but one well known, and it may be that unnecessary reference is here made to the history of the two sections of our code. The

distinction has time and again been recognized and applied by this court (see *Monroe v. State*, 5 Ga. 85; *Haynes v. State*, 17 Ga. 465; *Keener v. State*, 18 Ga. 194; 63 Am. Dec. 269; *Aaron v. State*, 31 Ga. 167; *Pound v. State*, 43 Ga. 88; *Killen v. State*, 50 Ga. 230; *Johnson v. State*, 72 Ga. 694; *Crawford v. State*, 90 Ga. 701; 35 Am. St. Rep. 242), and would not be referred to at this length, were it not that we have a certain class of cases where the distinction is not drawn, and which, if followed, would seem to be in conflict with the principle announced in the above cases, as well as the ruling in this. As examples, see *Hinch v. State*, 25 Ga. 699; *Stiles v. State*, 57 Ga. 183; *Wilson v. State*, 69 Ga. 224; *Heard v. State*, 70 Ga. 597; *Darby v. State*, 79 Ga. 63; *Jackson v. State*, 91 Ga. 271; 44 Am. St. Rep. 22.

It must not be understood that we either rule or intimate that the law of justifiable homicide *se defendendo*, as embodied in ²⁵ the Penal Code, section 73, is not good law. On the contrary, it is too well established and rests on too firm a principle to be questioned. In the cases to which it is applicable, it is the controlling law, and is supported by reason and the highest principles of justice. What we do mean to say is, that it is not applicable to cases of homicide where, for instance, the guilt of the accused is to be determined by the application of the law which justifies the homicide when done to prevent the commission of a felony, as provided in the code. It is undeniably true that a homicide committed in self-defense or in defense of habitation, property, or person, against one who manifestly intends or endeavors, by violence or surprise, to commit a felony on either, is justifiable homicide. It is also justifiable homicide to take the life of persons who manifestly intend and endeavor, in a riotous and tumultuous manner, to enter the habitation of another for the purpose of assaulting or offering personal violence to any person dwelling or being therein. The only limitation which attaches to the justification of a homicide falling under these classes is, that the circumstances be sufficient to excite the fears of a reasonable man that the felony or riotous entry set out is about to be committed, and that the party slaying really act under the influence of those fears and not in a spirit of revenge.

An examination of these two sections will show that full liberty and power is given to the citizen who acts in good faith to protect himself, his family, his habitation, and his property. It will further show that the law does not encourage the wanton or careless slaying of another; that on an occasion when two

persons are at fault, when they willingly engage in an affray the one with the other, the law imposes a duty on the slayer, and that is that he shall be free from blame. To justify such a one, it is not sufficient that the other is attempting to seriously injure him. Having willingly engaged in the affray, he is in equal fault with the other, and under such circumstances it is not justifiable for him to slay his adversary without more. He must repent; he must endeavor to withdraw from the difficulty; and after having used his utmost endeavors to escape from his adversary, it is only ²⁶ justifiable for him, after having exhausted his opportunities to withdraw from the contest, to take the life of his adversary when it is absolutely necessary for him to do so in order to save his own life.

It is entirely proper that these two sections of the code and these two theories of justifiable homicide should have been given in charge to the jury by the presiding judge in this case. It would not have been proper for him to have assumed, under the contentions raised, that this homicide occurred under circumstances which would make it justifiable under either one of the theories contended for; that was a question exclusively for the jury; and having been charged with the law applicable to justifiable homicide under the two theories, the jury could and would have applied the same according to the evidence as they believed it to be. The error which we hold has been committed is, that, having given properly all the law in both sections of the code relating to justifiable homicide, in summing up his charge and in the concluding part of it, the jury were instructed to "see whether or not it was necessary for the defendant to take the life of the deceased in order to save his own life. Before he would be justified and you would be authorized to find him guilty of no offense, you must believe from the evidence that it was necessary for him to take the life of the deceased in order to save his own life." As a conclusion of the whole law, the jury might have understood from this charge that unless it was necessary for the defendant, in order to save his own life, to take that of the deceased, he would not be justifiable. According to our view, this is not a correct interpretation of the law, and the defendant is entitled to a new trial because of that fact.

Judgment reversed.

All the justices concurring.

HOMICIDE—EVIDENCE OF CHARACTER OF DECEASED.—
Testimony in a murder case to show the dangerous character of the deceased is admissible only when self-defense is set up and the

accused proves a hostile demonstration on the part of the deceased menacing the life of the accused: *State v. Vallery*, 47 La. Ann. 182; 49 Am. St. Rep. 363, and note; *Gardner v. State*, 90 Ga. 310; 35 Am. St. Rep. 202, and note. Proof of such dangerous character can only be made by evidence of his general reputation in the community for such character, and not by evidence of specific acts or general bad conduct: *Garner v. State*, 28 Fla. 113; 29 Am. St. Rep. 232, and note. Such evidence must be weighed by the jury in determining whether the defendant's plea of self-defense is sustainable or not: *Karr v. State*, 100 Ala. 4; 46 Am. St. Rep. 17; *Childers v. State*, 80 Tex. App. 160; 28 Am. St. Rep. 899, and note.

TRIAL—ORDER OF PROOF—REOPENING CASE.—The order of proof is always within the discretion of the trial court, and will not be interfered with by the appellate court unless there has been an abuse of discretion: *Kindel v. Le Bert*, 23 Colo. 385; 58 Am. St. Rep. 234. It may even reopen the case for the purpose of receiving further evidence: *Kansas City v. Bradbury*, 45 Kan. 381; 23 Am. St. Rep. 731; *Rogers v. Miller*, 13 Wash. 82; 52 Am. St. Rep. 20, and note.

TRIAL—WEIGHT AND CREDIBILITY OF TESTIMONY—FUNCTION OF JURY.—It lies entirely with the jury to determine what weight should be given to the testimony of a witness who is shown to have made contradictory statements: *Springfield v. State*, 96 Ala. 81; 38 Am. St. Rep. 85; *Commonwealth v. Breyessee*, 160 Pa. St. 451; 40 Am. St. Rep. 729. It is within the exclusive province of the jury to determine the weight of voluntary confessions admitted in evidence without objection: *McGuff v. State*, 88 Ala. 147; 16 Am. St. Rep. 25; *Ellis v. State*, 65 Miss. 44; 7 Am. St. Rep. 634.

HOMICIDE—WHEN JUSTIFIABLE.—Homicide may be justifiable if committed in self-defense: *Alexander v. State*, 25 Tex. App. 260; 8 Am. St. Rep. 438; or in resisting unlawful arrest: *Jones v. State*, 26 Tex. App. 1; 8 Am. St. Rep. 454; or in defending against robbery: *Crawford v. State*, 90 Ga. 701; 35 Am. St. Rep. 242; or in defense of one's habitation or property: *State v. Thompson*, 9 Iowa, 188; 74 Am. Dec. 342, and note; or to prevent the commission of a crime: *Mitchell v. State*, 22 Ga. 211; 68 Am. Dec. 493, and note.

KING v. TRAVELERS' INSURANCE COMPANY.

[101 GEORGIA, 64.]

INSURANCE AGAINST ACCIDENT—CONSTRUCTION OF POLICY.—Under an accident insurance policy for a specified sum, containing a condition that if "injuries are sustained while riding as a passenger in any passenger conveyance using steam, cable or electricity as a motive power, the amount to be paid shall be double the sum above specified," the insurer is liable under such double indemnity to an insured person who is injured while attempting to alight from a moving street-car using electricity as a motive power. In such case, the insured is a passenger until he has completely disconnected himself and alighted from such car.

Reece & Denny, for the plaintiff.

Rowell & Rowell, for the defendant.

⁶⁵ COBB, J. King sued the Travelers' Insurance Company upon a policy of accident insurance. The defendant admitted

a liability for one hundred and twenty-five dollars and no more, while the plaintiff contended that it was liable for double that amount under the following clause of the policy: "If such injuries are sustained while riding as a passenger in any passenger conveyance using steam, cable, or electricity, as a motive power, the amount to be paid shall be double the sum above specified."

The only question presented is, whether the company is liable under the double indemnity clause above quoted. The plaintiff was injured while attempting to alight from a moving street-car using electricity as a motive power. It is conceded that the injury to the plaintiff was effected through such "external, violent, and accidental means" as to render the defendant liable under the terms of the policy, but it is denied that it was sustained "while riding as a passenger in" a passenger conveyance, and therefore liability for double indemnity under the clause above quoted has not arisen. We do not think this contention is sound. "A person may be said to be traveling in a carriage while alighting therefrom, until he has completely disconnected himself and alighted": 2 May on Insurance, sec. 524. See also *Northrup v. Railway Passenger Assur. Co.*, 43 N. Y. 516; 3 Am. Rep. 724.

There being nothing in the policy requiring a different construction to be placed upon the words, it is reasonable to hold that the insured was protected against all injuries caused by accidental means from the moment that he entered the conveyance until he had alighted therefrom. During this entire period he was riding as a passenger in the conveyance. This ⁶⁸ interpretation is required by the rule that requires words to be given their usual and ordinary meaning. The defendant is liable for the double indemnity notwithstanding there was a clause in the policy providing that "this insurance does not cover entering, or trying to enter, or leaving a moving conveyance using steam as a motive power (except cable and electric street-cars)." This clause is not dealing with the amount to be paid, but is an enumeration of cases in which there would be no liability, and injuries received on electric street-cars in the manner that plaintiff was hurt are expressly excepted from its operation.

Judgment reversed.

All the justices concurring.

RAILROADS—PASSENGERS—WHO ARE.—The question as to who are passengers on railroads, and when they become such, is

the subject of the monographic note to Illinois Central R. R. Co. v. O' Keefe, 61 Am. St. Rep. 75-104. One ceases to be a passenger on a street-car when he steps from the car to the street: Creamer v. West End Street Ry. Co., 156 Mass. 320; 32 Am. St. Rep. 456.

GILSTRAP v. SMITH.

[101 GEORGIA, 120.]

SURETYSHIP—RELEASE.—The maker of a note is not entitled to credit thereon of a sum paid to the payee by a surety on the note in consideration of his release as such surety.

SURETYSHIP.—HOLDER OF NOTES MAY COMPOUND WITH THE SURETY thereon without releasing the principal.

J. W. H. Underwood and H. H. Dean, for the plaintiffs.

J. B. Estes, for the defendant.

¹²¹ **SIMMONS, C. J.** We think that the judge did not err in granting a nonsuit. J. C. Martin was surety on the notes. Blackwell, his administrator, proposed to pay Smith, the holder, one hundred dollars to be released from his obligation as surety. Smith accepted the money and released Blackwell. The principals claimed that the sum so paid should be placed as a credit on the notes. We think that the payment should not inure to the benefit of the principals. It was not made to satisfy the debt, but was designed only to secure the release of the surety. He was willing to pay that much to be released from his liability on the notes, and the one hundred dollars paid was given in consideration of such release. It was not paid for the benefit of the principals, and they cannot compel the holder to place it as a credit on the notes. The holder of a note may compound with the surety thereon without releasing the principal: Civ. Code, sec. 2970; 2 Brandt on Suretyship and Guaranty, 484; Peer v. Kean, 14 Mich. 354.

Judgment affirmed.

All the justices concurring.

SURETYSHIP—RELEASE OF SURETY.—Part payment will not discharge the surety, even where it is agreed that such part payment will have that effect. Where a party is bound to pay a certain sum, there is no consideration in contemplation of law for a promise that a less sum will be received in satisfaction: Oberndorf v. Union Bank, 31 Md. 126; 1 Am. Rep. 31. For various things which will effect the release of a surety, see extended notes to Lindeman v. Rosenfield, 33 Am. Rep. 85, 86; Okie v. Spencer, 30 Am. Dec. 257, 258; and monographic note to Fassnacht v. Emsing-Gagen Co., 63 Am. St. Rep. 327-338.

PARKER v. SALMONS.

[101 GEORGIA, 160.]

ADVERSE POSSESSION BY PARENT AGAINST CHILD.— Possession of land acquired by a father under a conveyance made to his infant child, and delivered to him, can never be the foundation of, nor ripen into, a prescriptive title in his favor.

ADVERSE POSSESSION BY PARENT AGAINST CHILD.— Possession of land acquired by a father, under a conveyance to his infant child, delivered to him, and continued long after such child reaches majority, does not ripen into a title by prescription in his favor, without any conveyance to him, or holding other than by virtue of his original entry.

ADVERSE POSSESSION BY PARENT AGAINST CHILD.— Possession of land acquired by a father under a conveyance to his infant child, delivered to him, and continued long after such child attains majority, under a concealment from the grantee of the existence of such conveyance, together with the exercise of rights of ownership by renting to the grantee a portion of the land while the latter has no knowledge of his title, does not sustain a claim of title by prescription so as to enable the father or his representative to recover, against the grantee, possession taken by the latter after acquiring knowledge of the existence of his title under such conveyance.

DEEDS—DELIVERY—EVIDENCE OF.— Delivery to, and possession by, a father of a deed conveying to his infant child a tract of land, tend to prove delivery of the deed to such infant, although it does not purport on its face to have been delivered.

DEEDS—DELIVERY—EVIDENCE OF.— A deed duly recorded is admissible in evidence without further proof, not only to show that it was signed, but that it was also delivered.

DEEDS.—DELIVERY of a deed executed in behalf of an infant for the consideration of love and affection, to a witness of the deed for the benefit of such infant, is a delivery to the infant.

DEEDS—DESCRIPTION—EVIDENCE.— Although the description of land contained in a deed thereof is inaccurate in some details, yet if, when aided by competent extrinsic evidence and taken in connection with other deeds conveying other parcels of the same tract, the property intended to be conveyed can be sufficiently identified, it cannot be said, as matter of law, that the deed is so wanting, vague, and uncertain in description as to be void and inadmissible as evidence of title.

W. L. Hodges and A. G. McCurry, for the plaintiff.

J. H. Skelton and O. C. Brown, for the defendants.

¹⁶¹ **LITTLE, J.** The action which is the foundation of this case was in the form of an equitable petition, seeking to enjoin the defendants from building on a tract of land in controversy, from cutting or felling the timber thereon, from cultivating the land, from interfering in any manner with the petitioner in the management and cultivation of the land, and from interference with the possession and ownership of the plaintiff. The action was treated by the parties and the court

below as involving the title to the premises in dispute. The evidence was conflicting on many points raised, and the jury returned a verdict for the defendants. A motion for a new trial was overruled by the court, and the refusal to grant such new trial on the grounds assigned in the motion is the alleged error of which complaint is made.

It is not controverted that in 1845 one Jonathan Bailey ¹⁶² owned a tract of land containing about two hundred and sixty acres, known as the Robert Swilling tract, situated at that time in Franklin, now Hart county. In the record reference is made to three deeds which were in evidence, and which, if valid, conveyed the title to the Swilling tract out of Jonathan Bailey. One of these deeds, dated the 20th of December, 1845, conveys to James Reed a described tract of land containing seventy-eight acres, a part of the Swilling tract. The evidence further tends to show that at the date of this conveyance, the grantee, who was the son in law of the grantor, was living on said seventy-eight acre tract of land, and had so lived for some time previous to that date. The second of the deeds is dated the tenth day of December, 1845, and conveys to four persons, named Harris, whom the description shows to be minor grandchildren of the grantor, another part of said tract containing one hundred and sixteen acres. The third conveyance is from Jonathan Bailey to Sarah Reed, his granddaughter, dated also in December, 1845. It purports to convey sixty-six acres, for the consideration of natural love and affection. The property conveyed therein is designated as "balance of the Robert Swilling tract of land," et cetera. The deed further designates this particular tract as lying southwest from said James Reed; and it is not contested that, if this latter paper is valid as a deed, all of the Swilling tract is disposed of by these three conveyances. Only the deed last described is in question. The original was not produced at the trial. It appears that this deed was signed and sealed by Jonathan Bailey and "tested" by A. H. Black and Littleton Vincent. It does not purport on its face to have been delivered, but it appears that on the fifteenth day of December, 1845, it was probated in the usual form by one of the witnesses, Littleton Vincent, before H. F. Chandler, justice of the peace, and after such probate, it was on the same day recorded in the office of the clerk of the superior court of Franklin county. There is evidence in the record tending to show that the original deed from Jonathan Bailey to Sarah Reed was in the possession of James Reed, her father, during his lifetime. At the

time this paper purports to have been executed, the grantee, who was the daughter of James Reed, was of the age of three or four years; and it appears ¹⁶³ that James Reed went into possession of the land soon after the execution of the deed, and remained so in possession to the time of his death in 1894. Soon after he died, the defendants entered upon the land and were proceeding to build a house and prepare a portion of it for cultivation when these proceedings were instituted by the executor of James Reed.

1. The plaintiff in error bases his right to have granted the relief for which he prays on a prescriptive title in his testator. The record does not show any conveyance made by anyone at any time to James Reed to the land in dispute. It tends, however, to show that within a short time after the execution of the deed from the grandfather to the infant daughter of the testator, James Reed entered into possession; and in the absence of any conveyance to himself, and having custody of the deed to his infant daughter, the possession so acquired must be treated to have been under the conveyance to his daughter, in which case he would hold the land, not in his own right, but in the right of the daughter: *Dodd v. McCraw*, 8 Ark. 83; 46 Am. Dec. 301. Taking the testimony of the witness who saw the original deed in the father's possession to be true, it is manifest that he entered under that conveyance. Having so entered, such possession, while it continued, could never be the foundation of a prescriptive title. In order for possession to ripen into a title, it must be in the right of the possessor, and not of another: Civ. Code, sec. 3584.

2. But the plaintiff in error contends that this possession continued, not only during the infancy of the daughter, but for more than twenty years after she had attained her majority. This is not material, in ascertaining whether the testator had acquired the title by possession. Having entered, not in his own right, but in the right of another, and the possession thus obtained continuing, lapse of time would not ripen it into a title, there being no evidence of any conveyance to him, nor of any holding other than by virtue of his original entry.

It is further contended on the part of the plaintiff in error, that subsequently to the arrival at age of the daughter, the testator manifested by his acts that he claimed, as against her, possession of this land in his own right; that he continued so to ¹⁶⁴ manifest his right of possession against her for a period of more than twenty years; and that, notwithstanding his original

entry might not have been in his own right, after he made it appear that he did so claim possession of the land the possession thus claimed would ripen into title. However this may be, there is a reason why the jury before whom the case was tried might legally find that the possession so claimed did not result in a prescriptive title to the father. The witness who testified that he saw the deed from Jonathan Bailey to his granddaughter in the possession of the testator also testified that the testator knew its contents and knew who was the grantee therein; that he attempted to conceal knowledge of the existence of such deed and told the witness to say nothing about it; and it having been shown that at the time of the execution of the deeds in 1845, which made disposition of the Swilling tract, the grantor, Jonathan Bailey, had prepared a plat of that tract and each subdivision, covered by the respective deeds, which plat went into the possession of James Reed, presumably about the time of the execution of the deeds, and was found among his papers after his death, these facts would support a finding that the claim of possession in his own right by James Reed originated in fraud, which would prevent such claim from ripening into a title: Civ. Code, sec. 3584. If a person takes possession of land which he knows does not belong to him, no prescription will run in his favor, however long he may hold possession of the same. His possession under such circumstances originates in fraud, and time will not cure or sanctify the fraud: *Cowart v. Young*, 74 Ga. 694. The testimony of some of the witnesses shows that after the grantee had arrived at age and had married, the father rented to her a particular portion of this tract of land, she testifying that, at the time, she had no knowledge of her title. This is one of the strongest grounds that the plaintiff in error makes for basing a claim of adverse possession by the testator. At the time, however, of these acts which tend to manifest adverse holding, the evidence shows that the testator knew that the paper title to the land was not in him, but in the daughter to whom he rented. This knowledge was fatal to his claim of title. He could take nothing by his own ¹⁰⁵wrong: *Lane v. Lane*, 87 Ga. 271. When the doctrine of prescription is involved in a suit in ejectment, good faith is one of the main elements in the cause. If one purchases land in bad faith, knowing that the title he purchases is fraudulent, it can never ripen into a good title. The law will not permit the true owner to be defrauded of his land in that way: *Brown v. Wells*, 44 Ga. 573; *Hunt v. Dunn*, 74 Ga. 120. If it was a fact that

the testator entered into possession of this land under a deed to his daughter, he was in law a trustee for her, and it was his legal and moral duty, when she reached her majority, to transfer to her possession of the land, with the muniments of title: Thornton on Gifts, 159, et seq. If it be true that, instead of doing so, he concealed from her all knowledge of her title, claimed the title and right of possession in himself, and rented to her a part of the particular land which she owned, it was a moral wrong on his part, and the true owner of the land could not be ousted by an adverse claim made under these circumstances. This court has held in a number of cases that the fraud necessary to vitiate possession is more than a mere legal fraud. Adverse possession is one of intention, and it turns upon the good faith of the person setting it up. The facts must be such as to affect his conscience, and they must be brought home to him: Wright v. Smith, 43 Ga. 291. He must be cognizant of the fraud, not by construction, but by actual notice, and no man can be fairly said to hold land adversely to another who at the time he goes into possession has notice that he is perpetrating a fraud. His claim of right must have simply been pretended: Ware v. Barlow, 81 Ga. 1. In a case where an administrator had gotten into his hands assets, bonds, et cetera, belonging to the intestate in England, which were unknown to the heirs to have belonged to him and the heirs had only lately discovered the fact, the administrator having made no return of said assets, bonds, et cetera, but on the contrary, having not only concealed the fact that he had them, but that they in fact existed, Judge Story said that the guilty party shall not be allowed to say that his own concealment of the plaintiff's right shall work in his favor: Pratt v. Northam, 5 Mason, 110.

¹⁰⁰ It is true that in many of these matters the evidence was conflicting. The jury settled the question, however, as to the facts of the case. With that settlement this court is satisfied, and cannot say that the verdict which they rendered is contrary to the evidence and the principles of justice.

3. The plaintiff in error further contends that the court erred in admitting in evidence the deed from Jonathan Bailey to Sarah Reed, over the objection of plaintiff, the ground of such objection being that the instrument was not in law a valid deed. This assignment of error upon the validity of the deed is very general in its nature, and does not point out any particular invalidity which may exist. An inspection of the instrument, however, shows that it did not purport on its face to have been delivered.

It was signed in the presence of two witnesses, neither of whom was an officer, and their signatures as witnesses were made under the word "test." It is not essential, in our opinion, that the deed should have borne on its face any purport that it was delivered. Subsequently to its execution, the deed was, as before stated, probated in the usual form by one of the witnesses before a magistrate. The usual form is an affidavit that he saw the grantor sign, seal, and deliver it, for the purpose for which it was intended, in the presence of the two witnesses named. If there were any defects in the want of proper attestation of the deed as executed, this probate certainly makes it whole. The deed was recorded on the day this probate was made, and, at the time of this trial, had appeared on the records in Franklin county for nearly fifty years. The question of delivery was a proper question for the jury. The deed being recorded, it was admissible in evidence without further proof, not only to show that it was signed, but that it was also delivered: *Rushin v. Shields*, 11 Ga. 640; 56 Am. Dec. 436. The record of a deed is of itself presumptive proof of its delivery: *Wellborn v. Weaver*, 17 Ga. 275; 63 Am. Dec. 235; *Harvill v. Lowe*, 47 Ga. 217. In *Younger v. Guilbeau*, 3 Wall. 641, Field, J., says: "The registry of a deed by the grantor is entitled to great consideration upon this point, and might, perhaps, justify, in the absence of opposing evidence, a presumption of delivery": See, also, *Tiedeman on Real Property*, sec. 812; *Highfield* ¹⁶⁷ v. *Phelps*, 53 Ga. 59. Delivery of a deed executed in behalf of an infant for the consideration of love and affection, to a witness of the deed for the benefit of the infant, is delivery to the infant: *Watson v. Myers*, 73 Ga. 138. Under the circumstances which appear in the evidence as to the record and possession of the original deed, we deem the delivery to have been sufficient in law.

4. The instrument is inartistically drawn. The description of the land is shown in some details to be inaccurate. The deed does, however, by its terms convey the "balance" of the Robert Swilling tract of land; it does say that it contains sixty-six acres; it does place it as lying in a given direction from another known tract. In connection with the other deeds conveying the other parcels of the named tract, which were in evidence, we cannot say, as a matter of law, that the instrument is so wanting, vague, and uncertain in description as to be void and inadmissible as evidence of title; but that, when aided by other competent extrinsic evidence which we find in the record, the

property intended to be conveyed can be sufficiently identified, and such was the conclusion of the jury.

5. There was no error in admitting the testimony of Sarah Salmons, one of the defendants, on the ground that James Reed, the plaintiff's testator, was dead. The judgment of the court below is affirmed.

All the justices concurring.

ADVERSE POSSESSION—BETWEEN PARENT AND CHILD. In *Scarboro v. Scarboro*, 122 N. C. 234, land was conveyed by deed from parents to children in 1868. The father continued in possession of the land, which the deed purported to convey, until his death in 1878, and was succeeded by his wife, who remained in possession until 1896 continuing to exercise acts of ownership over it as her husband had done. It was held, upon the question being raised, that the continued possession by the grantors in the deed was adverse to the grantees, and had the effect of revesting title in the grantors if the deed had effected any divestiture of title. A son may hold adversely to his parent, but the character of the possession is a question for the jury: *Roberts v. Roberts*, 2 McCord, 268; 13 Am. Dec. 721. And where a father became insane and one of his sons took the management of his farm, holding it for more than the prescriptive period, he was held not to take title as against the heirs of his father: *Hunt v. Hunt*, 3 Met. 175; 37 Am. Dec. 130. Upon the general subject of adverse possession see monographic note to *De Frieze v. Quint*, 28 Am. St. Rep. 158-162.

DEEDS—DELIVERY—WHAT CONSTITUTES—EFFECT OF RECORDING.—A physical transfer of a deed from the grantor to the grantee is not absolutely essential to its delivery: *Rodemeler v. Brown*, 169 Ill. 347; 61 Am. St. Rep. 176. The question of delivery is one of intention, and delivery may be effected where a deed is given into a third person's hands for the benefit of the grantee, as where a deed to a minor was placed in her father's hands to be retained by him until she should attain years of discretion: See monographic note to *Brown v. Westerfield*, 53 Am. St. Rep. 539, 542. In some jurisdictions the recording of a deed is regarded as sufficient, if not conclusive, evidence of delivery: See monographic note to *Brown v. Westerfield*, 53 Am. St. Rep. 549, as to what is delivery of a deed.

DEEDS—SUFFICIENCY OF DESCRIPTION.—Courts should uphold rather than destroy deeds; and in the discharge of their duty in this respect, errors in description are frequently declared to be of no effect: *Sherwood v. Whiting*, 54 Conn. 330; 1 Am. St. Rep. 116. It is sufficient if a description enables one to identify the premises conveyed: *Nelson v. Brodhack*, 44 Mo. 596; 100 Am. Dec. 328; *Choteau v. Jones*, 11 Ill. 300; 50 Am. Dec. 460, and note; *Simpson v. Blaisdell*, 85 Me. 199; 85 Am. St. Rep. 348, and note.

PRITCHETT v. DAVIS.

[101 GEORGIA, 236.]

HOMESTEADS—LEASE OF BY HEAD OF FAMILY, WHEN VOID.—After a homestead has been set apart out of the lands of a husband for the benefit of his wife and minor children, a lease executed by him alone, during the continuance of the homestead, purporting to convey to third parties all rights to the timber on such land for turpentine and other purposes, and also all his right, title and interest in the sawmill timber thereon, to be cut by the lessees or their assigns, within a certain period, is void.

HOMESTEADS — INJUNCTION. — BENEFICIARIES in a homestead have such an interest in the use and enjoyment of the property as enables them directly to maintain a suit for an injunction to protect it against an illegal invasion.

HOMESTEADS—EVIDENCE.—The original homestead papers are primary evidence of the setting apart and valuation of the homestead. The record of such papers is only secondary evidence.

Petition for an injunction by Mrs. Davis, for herself and as next friend of her two minor children, against W. and T. J. Pritchett, alleging that plaintiffs held the paramount right to the exclusive possession, use, and control of a tract of land described, and which had been set apart for their use and benefit as a homestead out of the property of Arthur Davis, the husband and father of the plaintiffs; that defendants had entered on the land, and without lawful right were proceeding to box and cut for turpentine the pine timber thereon, under an alleged lease from said Arthur Davis alone, to the great damage of plaintiffs. Judgment for the plaintiffs, and the defendants prosecuted a writ of error.

J. M. Stubbs and Harrison & Peeples, for the plaintiffs in error.

I. Beasley and J. K. Hines, for the defendants in error.

240 LITTLE, J. 1. It will be seen from the foregoing statement of facts that the homestead estate upon which petitioners based their claim to the premises in dispute and prayer for injunction was allowed and approved on December 1, 1884, and recorded **241** December 9, 1884; while the contracts of lease and sale from the husband and father of the petitioners, and upon which the defendants relied, were executed, respectively, March 9, 1891, and December 21, 1894.

By article 9, section 2, paragraph 1, of the constitution (Civ. Code, sec. 5913) it is provided, with reference to property set apart for a homestead, that no court or ministerial officer in

this state shall ever have jurisdiction or authority to enforce any judgment, execution, or decree against the property set apart for such purpose, including such improvements as may be made thereon from time to time, except for taxes, for the purchase money of the same, for labor done thereon, for material furnished therefor, or for the removal of encumbrances thereon; and by the same article of the constitution, section 3, paragraph 1 (Civ. Code, sec. 5914), it is, among other things, provided that the debtor shall not, after the homestead is set apart, alienate or encumber the property so exempted, but it may be sold by the debtor and his wife, if any, jointly, with the sanction of the judge of the superior court of the county where the debtor resides, or the land is situated, the proceeds to be reinvested upon the same uses. A similar provision to that last quoted may be found in section 2847 of the Civil Code. In view of these positive provisions of law prohibiting the alienation or encumbrance of property set apart and subsisting as a homestead, except in the manner and for the purposes therein enumerated, we are only concerned to inquire whether the contracts of lease and sale, executed by the head of the family and relied on by the defendants, amounted to an alienation or encumbrance of the property, or any portion thereof, involved in this controversy. It will be observed that, by the provisions of the contracts of lease and sale, the defendants acquired all right to the entire timber suitable for turpentine purposes, together with the right of way and use of the timber for staves, hoops, stillhouses, and were also authorized to cut certain of the timber for sawmill purposes; all of these privileges to continue and subsist through a series of years. It is therefore apparent that, under the privileges granted, the defendants had authority to cut for sawmill purposes and remove every stick of timber ²⁴² or tree standing and growing upon this land, of certain given dimensions, or at least so much thereof as could be cut and removed within three years; they also had power and authority to cut and utilize the timber for staves, hoops, and stillhouses during this period of time, there being no limitation as to the character and dimensions of trees to be used for these latter purposes. Hence, under the privileges granted, it was within the power of the defendants to cut and remove from this land every vestige of timber standing and growing thereon, or so much thereof as might suit their convenience and purposes. These broad and extensive privileges and rights certainly amounted to an alienation of all or some portion of the timber growing upon

the land embraced within the homestead estate. By section 3045 of the Civil Code realty is defined to include all lands and the buildings thereon and all things permanently attached to either, or any interest therein, or issuing out of or dependent thereon, et cetera; and, accordingly, it has been held by this court that trees growing upon land constitute part of the realty: *Coody v. Gress Lumber Co.*, 82 Ga. 793; *Balkcom v. Empire Lumber Co.*, 91 Ga. 651, 655; 44 Am. St. Rep. 58; *Morgan v. Perkins*, 94 Ga. 353. It follows that one to whom growing timber has been conveyed, to be removed within a given time, acquires by reason of such conveyance an interest in the land, subject, however, to be divested if he fails to remove the timber within the time limited by the conveyance: *Morgan v. Perkins*, 94 Ga. 353. As was said by Justice Simmons in the case of *Coody v. Gress Lumber Co.*, 82 Ga. 793: "A sale of growing trees is a sale of an interest in land."

These authorities, and the reason upon which they are predicated, demonstrate that, by the terms of the contract of lease and sale made by the head of the family for whose benefit the homestead was set apart, a part of the realty embraced in the homestead estate was alienated to the defendants, and thus the inhibitions imposed by the constitution and laws of this state were contravened; and therefore these contracts of lease and sale were void and conveyed nothing to the defendants.

2. It was contended by the defendants that the plaintiffs could not maintain the proceeding instituted, but that Arthur²⁴⁸ Davis, as head of the family, was the only proper party to do so. The wife and family are the chief beneficiaries contemplated by the homestead and exemption laws. The homestead is set apart for their use and benefit; the real use and possession are in the wife and children: Civ. Code, secs. 2866, 2874. The possession of the husband is for them, and is therefore their possession: *Tucker v. Edwards*, 71 Ga. 602. As was ruled in the case last cited, where certain homestead property had been tortiously taken from the possession of the head of the family, and the wife was allowed to maintain a possessory warrant for its recovery, in passing upon the question as to whether the proceeding should have been instituted by the husband or the wife: "It is purely technical who should bring it." While it has been frequently ruled by this court that the head of the family could properly maintain proceedings looking to the protection of the homestead estate (*Zellers v. Beckman*, 64 Ga. 747), it has likewise been ruled that the beneficiaries have such an in-

terest in the use and enjoyment of the property as will entitle them to protect it against an illegal invasion: *Eve v. Cross*, 76 Ga. 693. Especially were the beneficiaries of this homestead estate entitled to maintain the present action, it appearing that the father and husband had in the first instance declined and refused to apply for the homestead, and that in his stead the wife had applied for and had the same set apart; and the father having subsequently, during the existence of the homestead for their use and benefit, sought to convey away a portion of the property to the use and possession of which they were entitled, in violation of their legal rights, they not only had the right, but indeed were the proper parties to institute this proceeding for the protection of their rights thus sought to be infringed: See *Tucker v. Edwards*, 71 Ga. 602.

3. In support of their claim to the use and possession of the land involved in this proceeding, and of their prayer for injunction and other relief, the plaintiffs offered to introduce the original homestead papers, including the petition therefor, affidavit to the same, schedules, and approval and entry of record. The defendants objected to the introduction of these ²⁴⁴ papers, on the ground that the original papers were not the best evidence of the setting apart of the homestead, but insisted that the same should be proved by a certified copy from the records in the office of the clerk of the superior court. This objection, however, was overruled by the court below, and the original papers admitted. The claim set up by the plaintiffs was predicated upon the existence of the homestead in their favor; and it was necessary for them, in order to maintain the proceeding, to show the setting apart of the homestead. For this purpose, the original papers are the highest and best evidence; they are primary evidence of the fact: Civ. Code, secs. 5211, 5212. This point was directly ruled in the case of *Brown v. Driggers*, 60 Ga. 114, where it was held that an exemplification or certified copy of the plat of homestead and schedule of personalty set apart by the ordinary and approved by him, certified by the clerk of the superior court of the county where the same are recorded, is only secondary evidence, under these sections of the code, and such certified copy is not admissible in evidence until the original, which should be in possession of the party claiming the homestead, is accounted for. A similar ruling was made in *Larey v. Baker*, 85 Ga. 687. The court therefore properly admitted the original homestead papers, and excluded the certified copy from the records of such papers offered by the defendants.

4. It follows from the rulings made above that the plaintiffs

made a case entitling them to the injunction as prayed, and as each of the defendants was a party to the contracts of lease and sale, the court did not err in granting the injunction as against both of them.

Judgment affirmed.

All the justices concurring.

HOMESTEAD—LEASE OF BY HUSBAND.—A lease for years of a homestead is an alienation of an interest therein to which the joint consent of husband and wife is essential: *Wea Gas etc. Co. v. Franklin Land Co.*, 54 Kan. 533; 45 Am. St. Rep. 297, and note. But it has been held that a husband may, without joining the wife, give a license for the removal of minerals from the premises, if their use as a homestead is not thereby impaired, especially where she tacitly acquiesces in the work: See monographic note to *Poole v. Gerrard*, 65 Am. Dec. 487. A husband's conveyance of a right of way over the homestead is void unless joined in by the wife: *McGhee v. Wilson*, 111 Ala. 615; 56 Am. St. Rep. 72, and note.

WILLIAMSON v. WHITE.

[101 GEORGIA, 276.]

EXECUTIONS.—AN EXCESSIVE SEIZURE under execution of a defendant's property is a fraud upon his rights and void; and a sale by parcels does not cure it, when it appears that the seizure of anyone of the parcels would have been in itself an excessive levy.

TAXES—EXCESSIVE LEVY AND SALE FOR.—An excessive levy of an execution on land and the sale thereof for the nonpayment of taxes is void at the option of the owner.

EXECUTION SALES—APPLICATION OF PURCHASER TO BE PUT IN POSSESSION—PARTIES BOUND BY PROCEEDING. If, when a purchaser of real estate at execution sale applies to the court for an order requiring the sheriff to put him in possession thereof, one who claims to be the owner of the property appears at the hearing and presents written objections to the granting of such order, he is not, unless actually made a party to such proceeding, bound by any judgment rendered therein.

D. M. Roberts, J. M. Stubbs, and Harrison & Peeples, for the plaintiffs in error.

J. H. Martin, A. C. Pate, and I. S. Chappell, for the defendant in error.

277 COBB, J. J. M. White filed in the superior court of Laurens county his petition against D. F. Williamson and Isaac Grantham, for injunction, cancellation of papers under which Williamson claimed title to certain land in said county, and general relief. Upon the retrial of the case, the judge directed the jury to "find a verdict for the plaintiff for the land in dis-

pate." The defendants made a motion for a new trial, which was overruled, and they excepted.

The plaintiff derived his title as follows: C. B. White inherited the land in controversy from his father, Joseph M. White, Sr., and conveyed the same to Mayer & Watts on January 2, 1888. Mayer & Watts conveyed to plaintiff on April 29, 1889.

The defendant Williamson derived his title as follows: C. B. White, after April 1, 1888, returned the lands in dispute, five hundred and fifty-five acres, to the tax receiver of Laurens county at a valuation of eleven hundred and ten dollars. The taxes assessed by the state and county thereon were not paid on December 20, 1888. The tax collector issued a fieri facias against the land and C. B. White for the sum of thirteen dollars and seventy-seven cents and fifty cents costs. On March 29, 1889, the fieri facias was levied upon the five hundred and fifty-five acres, embracing three lots, being numbers 167, 168, and 193 in the twenty-second district of Laurens county. On the first Tuesday in June, 1889, the sheriff exposed the property levied on for sale in separate parcels. Number 167, after several bids, was purchased by Williamson & Holmes, a firm of which defendant Williamson was a member, for eight dollars; number 168 was next sold to the same purchasers for five dollars and fifty cents; number 193 was then sold and bought by one Summerlin for twenty dollars. It appeared that two of the lots contained two hundred acres ²⁷⁸ each, and the third lot one hundred and fifty-two and one-half acres, and that the land was worth at least two dollars per acre, and probably much more. The defendant Williamson subsequently acquired the entire interest in the lots purchased by the firm of which he was a member.

1. That a levy of the character described is such a fraud that the owner of the property, or anyone claiming under him, may have it declared void, is too well settled by the adjudications of this court to now admit of discussion: *Brinson v. Lassiter*, 81 Ga. 40, and cases cited; *Forbes v. Hall*, 102 Ga. 47; *Mixon v. Stanley*, 100 Ga. 372. The fact that the sheriff sold the three lots levied on separately does not alter the case. The levy of a fourteen-dollar execution upon one hundred and fifty-two and one-half acres of land, which was the smallest lot, and of the value, according to the evidence, of at least two dollars an acre, would have been so grossly excessive as to have avoided the sale if no other lots had been included in the levy. An excessive seizure by the sheriff of a defendant's property is what constitutes the fraud upon his rights, and a sale by parcels will not

cure it, when it appears that the seizure of any one of the parcels would have been in itself an excessive levy. Purchasers are deterred, and wisely so, from buying property offered in parcels, where the levy as a whole is so grossly excessive as to render the same voidable for fraud.

2, 3. When the purchasers of real estate at a sale under execution apply to the superior court for an order requiring the sheriff to place them in possession of the property purchased, as provided in section 5469 of the Civil Code, there is no provision of law authorizing anyone to appear and object. If, however, one claiming the land which has been sold comes in and is made a party to the proceeding by order of the court, and raises questions as to the legality of the sale, and has the title of the purchaser adjudicated in a proceeding which would otherwise affect only the question of possession, it may be that such party, by thus voluntarily submitting the question to the court, would be, as against such purchaser, afterward estopped from again raising the questions which were expressly passed on by the court. It is, however, unnecessary for us to so decide, as the facts of this case do not require it. ²⁷⁹ It appears that when application was made to the court for an order directing the sheriff to put the purchasers in possession of the property, an attorney representing the plaintiff in this case appeared and stated to the court various reasons why such order should not be granted; that such reasons were reduced to writing in the form of an answer to a supposed rule against the plaintiff, and filed with the clerk and afterward withdrawn and placed in the hands of the sheriff. There was no formal application to be made a party to the proceeding in which the purchaser was applicant and the sheriff was respondent, and there was no order of the court making him a party, and the judgment of the court does not appear in terms to adjudicate any matter except such as is germane to the proceeding in which the sheriff alone would be a respondent. The plaintiff did not become a party to the proceeding by such conduct, and nothing done by him, or his counsel in his behalf, would estop him from setting up title to the property antagonistic to the title derived at the tax sale. The allegations in the answer, standing alone, are probably sufficient to show that the plaintiff was a party to the proceeding instituted by the purchasers against the sheriff to obtain possession, but when they are construed in the light of the exhibits which are referred to, and which purport to be the record of the case so far as it relates to the connection of the plaintiff with the proceeding against the

sheriff, it appears that he was never made a party. If the facts stated in an answer are contradictory of those that appear in an exhibit, the general averments of the answer must yield to the particular facts of the exhibit: *Freiberg v. Magale*, 70 Tex. 116.

The exhibit showing that the plaintiff was not a party, it was therefore proper to hold on demurrer to the answer that there was no sufficient allegation that the plaintiff was a party to the proceeding therein referred to.

4. The defendant's title depending upon the tax sale referred to above, and the claim that the plaintiff was estopped by his having had the question of title adjudicated in the proceeding against the sheriff, and the case being controlled by the ruling on these two points, there was no error committed ²⁸⁰ by the judge in striking so much of the answer as attempted to set up the estoppel referred to, and in refusing to admit the entire evidence offered to prove the part so stricken. It was right, therefore, under the facts of the case, to direct a verdict for the plaintiff.

Judgment affirmed.

All the justices concurring.

EXECUTION—EXCESSIVE LEVY—EFFECT OF.—The amount of property which an officer may levy upon and sell by virtue of an execution is not defined by law, but it is confided to the sound discretion of the officer to levy upon and sell only such an amount as will satisfy the execution, having reference to the convenience of division or separation of property for such purpose; and the officer will be held liable according to the facts and circumstances of each case, for making an excessive levy: *Cornelius v. Burford*, 28 Tex. 203; 91 Am. Dec. 309. An excessive levy invalidates an execution: *Glidden v. Chase*, 35 Me. 90; 56 Am. Dec. 690, and note. Compare *Ingram v. Belk*, 2 Stro. 207; 47 Am. Dec. 591. Where a sheriff, under an execution, sells more of a tract than will satisfy a debt, the sale is unauthorized and void: *Patterson v. Carneal*, 8 A. K. Marsh. 618; 13 Am. Dec. 208, and note.

JUDGMENTS—AS TO ONE NOT PARTY OF RECORD.—Judgment in a proceeding does not conclude one not a party thereto: *Short v. Galway*, 83 Ky. 501; 4 Am. St. Rep. 168. To bind one not a party of record by a former judgment, it is essential that he should have openly intervened in the former suit, assuming its direction and control, to the knowledge of the opposite party, for the prosecution or defense of some interest in the subject of the suit, or to avoid a liability he may be under to indemnify the defendant against an adverse judgment: *Central Baptist Church v. Manchester*, 17 R. I. 492; 33 Am. St. Rep. 893, and note. See *Cecil v. Cecil*, 19 Md. 72; 81 Am. Dec. 626; *Lipscomb v. Postell*, 88 Miss. 476; 77 Am. Dec. 651, and notes thereto.

ALLEN v. PEARCE.

[101 GEORGIA, 316.]

EXECUTIONS—EXEMPTIONS—“AGED PERSON.”—A man sixty-six years of age, though “hale and hearty,” is entitled to an exemption of his property from levy and sale under execution, under a constitutional provision allowing this right to “every aged or infirm person.”

J. J. Bull and A. J. Perryman, for the plaintiff in error.

Brannon, Hatcher & Martin, J. H. McGehee and J. H. Worrell for the defendant in error.

316 FISH, J. On January 11, 1895, James Allen applied to the ordinary of Talbot county for the setting apart of a homestead and exemption to himself, as an “aged person,” alleging in his petition that he was sixty-six years of age. T. J. Pearce, a creditor of the applicant, filed an objection on the ground that Allen was not an “aged person” in contemplation of law. The homestead was granted, and the objector appealed to the superior court. On the trial there, it appeared that the applicant was sixty-six years old, and that he was “hale and hearty.” **317** The judge directed a verdict in favor of the objector, on the ground that the petition and evidence did not show that the applicant was entitled to a homestead. This ruling is assigned as error. It will be observed that the sole question made by this record is, whether a man sixty-six years of age, though “hale and hearty,” is entitled to an exemption of his property from levy and sale, under that clause of the constitution (Civ. Code, sec. 5912) allowing this right to “every aged or infirm person.” The right is to “every aged or infirm person.” If he be “aged,” he is entitled to the exemption whether he be infirm or not. So if he be infirm, he has the right to it without regard to his age. It would be difficult to designate an exact period of life when one might with certainty be said to have become “aged”; yet there are certain ages fixed by our statutes which, when attained, relieve a man of some of the burdens of citizenship. After he reaches the age of fifty years he is no longer subject to road duty, and after he is sixty years old he is relieved of poll-tax, and, at his option, of jury service. It has been held in an English case that persons fifty years of age are aged: *Pomeroy v. Willway*, L. R. 42 Ch. Div. 510. There a testator directed that the interest of a fund should forever “be divided into annuities of ten pounds each and be paid, half-yearly, to an equal number of men and women not

under fifty years of age, Unitarians, and who attend Lewin's Mead Unitarian Chapel or chapels in Bristol." The question was whether or not the gift was charitable. And it was held that persons not under fifty years of age were "aged" persons, within the meaning of the statute of charitable uses (43 Elizabeth, c. 4), providing for gifts "for the relief of aged and impotent and poor people," and that the bequest was good as a charitable gift. While we are not to be understood as fixing, with accuracy, the time when human beings become "aged," yet we deem it safe to hold that a man sixty-six years old, though "hale and hearty," is entitled to homestead and exemption under the above cited constitutional provision.

Judgment reversed.

All the justices concurring.

EXECUTION — EXEMPTIONS — CONSTRUCTION OF STATUTES.—Exemption laws are to be liberally construed to carry into effect the purposes for which they were enacted: *Equitable Life etc. Co. v. Goode*, 101 Iowa, 160; 63 Am. St. Rep. 378, and note. For a discussion of who may claim the benefit of exemption statutes see monographic note to *Rockwell v. Hubbell*, 45 Am. Dec. 254. Parties claiming the benefit of such statutes must bring themselves at least within the spirit of their provisions: *Charles v. Lamberson*, 1 Iowa, 435; 63 Am. Dec. 457.

PHENIX INSURANCE COMPANY v. CLAY.

[101 GEORGIA, 331.]

INSURANCE—HOUSE LET FOR IMMORAL PURPOSES.—A policy of insurance on a house leased by the owner to a lewd woman, with knowledge on his part that it is to be used by her for the purposes of prostitution, is not void so as to defeat a recovery in case of loss in the absence of any stipulation in the policy under which the immoral use of the house vacates the contract. In such case, the contract of insurance does not grow out of, nor is it connected with, the immoral and illegal use of the house; and, it is clearly disconnected from the contract of rental for such use.

INSURANCE—REFUSAL TO PAY LOSS—LIABILITY.—If questions of law made in an action to recover insurance, are of such character as to acquit the insurer of bad faith in refusing to pay the loss within the time limited by law, he is not liable for damages and attorneys' fees required by him to be paid in case he refuses in bad faith to pay the loss within sixty days after demand.

Dessau & Bartlett and R. Hodges, for the plaintiff in error.

Hardeman, Davis & Turner, for the defendant in error.

333 SIMMONS, C. J. The Phenix Insurance Company issued to Clay a policy of insurance on a house of the latter, which

had been by him let to a lewd woman with knowledge on his part that it was to be used by her for purposes of prostitution. The question to be decided here is as to whether the fact that the house was so rented and used will, in case of loss, defeat Clay's action on the policy. In the absence of any stipulation in the policy under which the immoral use of the house would vacate the contract, the policy would not be vacated unless it be shown that the contract is immoral or illegal or is against public policy and not enforceable. It is well settled that contracts will not be avoided by the courts as against public policy, except "where the case is free from doubt and where an injury to the public interest clearly appears." Therefore, to defeat the action on the policy, it must be shown either that the policy is itself illegal as promoting or tending to promote the maintenance of a lewd house, or that the contract of insurance, while in itself legal, is so connected with the illegal act or business or with the contract of rental that the courts, on grounds of public policy, will not lend their aid in its enforcement.

1. Let us consider these questions in inverse order. In the case of *Armstrong v. Toler*, 11 Wheat. 258, opinion by Marshall, C. J., the supreme court of the United States held: "Where a contract grows immediately out of, and is connected with, an illegal or immoral act, a court of justice will not lend its aid to enforce it. But if the promise be entirely ³³³ disconnected with the illegal act, and is founded on a new consideration, it is not affected by the act, although it was known to the party to whom the promise was made, and although he was the contriver and conductor of the illegal act." The same court, in the case of *Ocean Ins. Co. v. Polleys*, 13 Pet. 157, held: "A contract may be valid, notwithstanding it is remotely connected with an independent illegal transaction, which, however, it is not designed to aid or promote." The same doctrine was held by this court in the case of *Howell v. Fountain*, 3 Ga. 176, 46 Am. Dec. 415, where the court commended and recognized as well founded the statement that "no action can be maintained upon an illegal or immoral contract; yet where the contract was disconnected with the original unlawful act and was founded on a new and distinct consideration, an action might be maintained upon it, although it could not be maintained upon a contract directly arising out of the illegal act." So here, if the policy of insurance be shown to grow immediately out of the illegal use of the house or to be directly connected therewith, the courts will not enforce it. So far as the insurance is concerned, neither party to the policy was

benefited by the illegal use of the insured property. The contract of insurance cannot be said to grow out of or be connected with the illegal use of the house. To the contrary, the policy was made to insure the owner of the building against accident to which all houses are liable, and this house neither more nor less on account of its use for purposes of prostitution. For the same reasons the insurance policy was clearly disconnected with the contract of rental and founded on a new and distinct consideration, only one of the parties, indeed, being common to the two contracts. In such cases it is well settled in this and other jurisdictions that an action may be maintained to enforce a contract valid in itself though it may be "remotely connected with an independent illegal transaction, which, however, it is not designed to aid or promote." If, therefore, the insurance policy be treated as in itself valid, it is enforceable although possibly connected in a remote way with an illegal business and with a contract of rental which is probably not enforceable: 3 Joyce on Insurance ³³⁴ sec. 2507. To defeat the action on the policy, it is therefore necessary to show that the policy is itself an immoral contract and against public policy as tending to promote the business of maintaining a lewd house.

The policy was for a valuable and legal consideration and for what appears on its face to be a good and lawful purpose. It was made not to protect the business of keeping a lewd house, but to protect the property of the owner of the building. Even were the owner the person conducting this illegal business, the policy would be issued to him, not as one engaged in such business, but as the owner of the property insured; not to protect him against the consequences of the illegal business, but against accident to his property. For this reason, the present case is to be distinguished from decisions cited in which policies of lottery and marine insurance have been held void. The distinction is well drawn in the case of *Niagara Falls Ins. Co. v. De Graff*, 12 Mich. 124, by Campbell, J., a part of whose opinion is here adapted to the present one. The insurance of a lottery ticket requires that the lottery be drawn in order to attach the insurance on the risk. Where a ship is insured for an illegal voyage, that voyage is the only one upon which the insurance would apply, and the underwriter becomes thus directly a party to the illegal act. In some cases, the insurance is against loss by forfeiture or penalty incurred by reason of the illegal trade, and the purpose and object of the insurance are therefore a violation of law. In some of the cases, again, the insured property is liable to seizure

and forfeiture, and a doubt arises as to whether the assured has an insurable interest. To make analogous to these the case of an insurance on property used for immoral purposes, the insurance must be against the consequences of a breach of the law, as would be the case if this policy in express terms insured the party maintaining a lewd house against loss by fine or penalty incurred by reason of the illegal business. The policy, as in fact made, differs widely from this; for, as we have seen, it insured against loss by fire, and not against the consequences of the unlawful conduct of the assured. The owner could, without violating the policy, use his house for any other and lawful purpose which ³³⁵ would not increase the hazard. The contract does not require that the property shall be devoted to any one use, and, as it is susceptible of lawful uses, the company cannot be held to have contracted concerning it in an unlawful manner unless the contract is itself for an illegal purpose. It is clear, then, that the purpose and object of the contract of insurance are not in contravention of the public interest; and the sole remaining question is, whether that contract is against public policy as tending to promote an illegal and immoral business.

Were insurance policies not enforceable when issued on buildings used as houses of prostitution, the owners of such buildings might be less willing to have them so used. To hold such policies good and binding might, therefore, while holding out absolutely no aid to such uses, indirectly and negatively encourage owners to let their buildings for immoral purposes. A consequence so negative in its character, so remote in its effect, is one which cannot be said in law to promote or to tend to promote the maintenance of these houses. Such policy of insurance can be said to promote the illegal business only by failing to discourage it, to aid it only by declining to throw obstacles in its way, and certainly this is not a case "free from doubt, where an injury to the public interest clearly appears." See 3 Joyce on Insurance, secs. 2536, 2537. To refuse to enforce transactions relating to property used by the owner for immoral purposes, unless such transactions tended positively to discourage such illegal use, would be to infringe on the property rights of the owner and to extend the penalty beyond that prescribed by law. The statute which forbids the maintenance of a lewd house does not subject the building to any forfeiture, but renders him who maintains the lewd house guilty of a misdemeanor and personally liable for a penalty. The rights of the owner in his property are not, therefore, lessened, for the penalty relates to his person and not to the house. If an insurance policy on a building used as a house of

prostitution will not be enforced by the courts, why should they not also refuse to enforce a contract for the sale of the building? For, while to allow the sale of the house would not encourage its illegal use, yet to disallow the sale would discourage such use ³³⁶ fully as much as a refusal to accord insurance rights. Without doubt this would be an effort to invade the province of the legislative branch of our government by extending and increasing the penalties imposed for the illegal act in question. Further, to hold that a policy of insurance on a lewd house is contrary to public policy as tending to promote the keeping of a lewd house would be to require not only that a contract shall not tend to promote an immoral or illegal act of business, but that it shall tend positively to discourage any unlawful acts in connection with the property to which it relates. For such position we believe that no authority can be found.

2. This court at the March term, 1895, upon a former writ of error, dealt with all the questions made in the record of this case, except as above decided, and by its decision then made fully determined such questions: *Clay v. Phoenix Ins. Co.*, 97 Ga. 44.

3. We think that the insurance company should not be made to pay damages or attorney's fees. It is provided by section 2140 of the Civil Code that insurance companies shall, where a loss occurs and they refuse to pay the same within sixty days after demand, be liable for damages and attorney's fees, "provided, it shall be made to appear to the jury trying the same that the refusal of the company to pay said loss was in bad faith." The questions of law made in this case were of such character as to acquit the defendant of the imputation of bad faith in refusing to pay the loss within the time limited by law; and the court has accordingly given appropriate direction that the damages and attorney's fees allowed on account of refusal to pay be written off.

Judgment affirmed, with direction.

All the justices concurring.

INSURANCE—VALIDITY OF POLICY.—An insurance is valid though made on a distilling business carried on without the license required by law: *People's Ins. Co. v. Spencer*, 53 Pa. St. 353; 91 Am. Dec. 217. So, an insurance of wines and liquors as part of a stock of drugs and medicines and such merchandise as is usually kept in a country store, is not necessarily invalid as an insurance of liquors kept for illegal use: *Carrigan v. Lycoming Fire Ins. Co.*, 53 Vt. 418; 38 Am. Rep. 687. But insurance on goods in a business carried on without the license required by law is invalid under a statute declaring void all contracts "in reference to the business" so conducted: *Pollard v. Phenix Ins. Co.*, 63 Mass. 244; 56 Am. Rep. 805. See, also, *Hinckley v. Germania Fire Ins. Co.*, 140 Mass. 38; 54 Am. Rep. 445.

BOARD OF EDUCATION v. PURSE

[101 GEORGIA, 422.]

SCHOOLS—EXCLUSION OF CHILD FOR PARENTS MISCONDUCT.—If a parent, whether father or mother, goes to the schoolroom of a lawfully established public school; and, in the presence of his or her children and other pupils publicly calls into question the justice or correctness of a decision of the teacher in a matter of discipline relating to such children; uses offensive and insulting language to such teacher, acts in such a manner as to interrupt the exercises of the school, and conducts himself or herself in such manner as to bring the teacher and the discipline of the school into contempt in the eyes of the pupils, it is the duty of the authorities of such school to exclude from the schoolroom the child or children of such parent, although the child thus excluded has not been guilty of a violation of any rule of the school.

SCHOOLS—EXCLUSION OF CHILD FOR MISCONDUCT OF PARENT.—The board of education, either in the absence of a rule, or in furtherance of a prescribed rule, has the right to exclude from a public school under its control any child whose parent, whether father or mother, in the schoolroom or its vicinity, in the presence of such child and other pupils, conducts himself or herself in such manner that his or her acts are calculated to produce disorder in the school and break down and destroy its discipline, although the child thus excluded has not violated any rule of the school.

J. W. Akin, J. M. Neel, and A. M. Foute, for the plaintiffs in error.

J. W. Harris, Jr., and A. S. Johnson, for the defendant in error.

426 COBB, J. When a parent goes to the schoolroom of a lawfully established public school and in the presence of his or her children and other pupils publicly calls in question the justice or correctness of a decision made by the teacher in a matter of discipline relating to such children, uses offensive and insulting language to such teacher, and acts in such a manner as to interrupt the exercises of the school, and conducts himself or herself in such a manner as to bring the teacher and the discipline of the school into contempt in the eyes of the pupils, it is not only lawful, but it is the duty of the authorities of the school in the protection of the teacher whom they have placed on duty, as well as to sustain the character and discipline of the school, to exclude from the schoolroom the children of such parent, and this too although those thus excluded had not been guilty of a violation of any rule of the school.

The constitution of the state provides that: "There shall be a thorough system of common schools for the education of children in the elementary branches of an English education only,

as nearly uniform as practicable, the expenses of which shall be provided for taxation or otherwise. The schools shall be free to all children of the state, but separate schools shall be provided for the white and colored races": Civ. Code, sec. 5906.

The general assembly, in the act intended to carry out this mandate of the constitution and provide a system of common schools outside of incorporated towns and cities, declared that: "Admission to all common schools shall be gratuitous to all children between the ages of six and eighteen years, residing in the subdistricts in which the schools are located": Pol. Code, sec. 1378.

It is also provided in the constitution that "authority may be granted to municipal corporations, upon the recommendation of the corporate authority, to establish and maintain public schools within their respective limits, by local taxation; but no such local law shall take effect until the same shall have been submitted to a vote of the qualified voters in each municipal corporation and approved by ⁴²⁷ a two-thirds vote of persons qualified to vote at such election; and the general assembly may prescribe who shall vote on such question": Civ. Code, sec. 5909.

By an act approved December 24, 1888, the general assembly, under the authority of the section last quoted, made provision for the establishment of a system of public schools in the city of Cartersville, to be maintained by local taxation: Acts 1888, p. 323. The election which the constitution required having resulted in favor of the establishment of the schools, the act went into effect, and the schools thus established went into operation. The government of the schools was vested in a board of commissioners, who had "authority to establish, and from time to time modify, a system of public schools for said city of Cartersville, to be open not less than six nor longer than ten scholastic months in each year," and also "to purchase, build, enlarge, and rent buildings, appurtenances, and furniture for school purposes, to employ a superintendent or principal and other teachers, to suspend or discharge them for good causes, to prescribe the terms upon which students are to be received into said schools, and to establish such rules, regulations, and by-laws as they may deem right and proper in maintaining a system of public schools in said city; provided, the same are not inconsistent with the constitution and laws of this state." It was declared that "all children between the ages of six and eighteen years, whose parents, guardians, or natural protectors bona fide reside

- within the corporate limits of said city, shall be entitled to the benefit of said schools.”

That municipal schools thus established are a part of the common school system provided for by the constitution there can be no question; and they must therefore conform in all respects to the requirements of the constitution. It follows that the act creating the school system for the city of Cartersville must be construed as establishing schools which shall be free to all children who may lawfully enter the same in that municipality: *Irvin v. Gregory*, 86 Ga. 605.

- The board of commissioners of the city of Cartersville (hereafter referred to as the board of education) adopted the following ⁴²⁸ rule in reference to the admission of children into such schools: “All children residing within the limits of the city, who are not otherwise disqualified by these regulations, and who are between the ages of six and eighteen years, shall be entitled to attend the public schools of the city, the parents or guardians furnishing to the principals evidence of their citizenship, giving name and age of pupil and name of street on which they reside.”

Under such a system as that above outlined, beginning with the constitutional provision for a system of common schools and ending with the rule of the local school board, is the right to attend school inherent in the child, or is the purpose of the law simply to provide a place where parents may discharge the obligation which they owe to their children to give them an education?

At common law, it was the duty of parents to give to their children “an education suitable to their station in life—a duty pointed out by reason, and of far the greatest importance of any”: 1 Blackstone’s Commentaries, 450.

“The education of children in a manner suitable to their station and calling is another branch of parental duty, of imperfect obligation generally in the eye of the municipal law, but of very great importance to the welfare of the state. Without some preparation made in youth for the sequel of life, children of all conditions would probably become idle and vicious when they grow up, either for want of good instruction and habits, and the means of subsistence, or from want of rational and useful occupation. A parent who sends his son into the world uneducated, and without skill in any art or science, does a great injury to mankind, as well as to his own family; for he defrauds the community of a useful citizen, and bequeaths to it a nuisance. This parental duty is strongly and persuasively inculcated by the writers on natural law”: 2 Kent’s Commentaries, *195, *196.

In the case of *Rulison v. Post*, 79 Ill. 567, Mr. Justice Walker in the opinion says: "Parents and guardians are under the responsibility of preparing children intrusted to their care and nurture for the discharge of their duties in after life. Law-givers ⁴²⁹ in all free countries, and, with few exceptions, in despotic governments have deemed it wise to leave the education and nurture of the children of the state to the direction of the parent or guardian. This is, and has ever been, the spirit of our free institutions. The state has provided the means, and brought them within the reach of all, to acquire the benefits of a common school education, but leaves it to parents and guardians to determine the extent to which they will render it available to the children under their charge."

While the common law recognized this as a duty of great importance, there was no remedy provided for the child in case this duty was not discharged by the parent. The child, at the will of the parent, could be allowed to grow up in ignorance and become a more than useless member of society; and for this great wrong, brought about by the neglect of his parents, the common law provided no remedy. Not only no remedy was given to the child, but no punishment was inflicted upon the parent. In attempting to give a reason for this defect in the common law, Sir William Blackstone says: "Perhaps they thought it punishment enough to leave the parent, who neglects the instruction of his family, to labor under those griefs and inconveniences which his family, so uninstructed, will be sure to bring upon him": 1 Blackstone's Commentaries, 781.

While the common law provided for apprenticing poor children, and thereby giving them some of the advantages of an education, "the rich indeed," says the same writer, "are left at their own option whether they will breed up their children to be ornaments, or disgraces, to their family." This part of the common law became a part of the law of this state: Civ. Code, sec. 2501. The section cited declares that the father shall provide for the maintenance, protection, and education of his child, but relatively to the matter of education no provision is made for the punishment of a parent who fails to discharge this duty, or for the relief of the child who is a victim of such failure. It will be seen from an examination of our statutes in reference to the subject of education at the public expense that they contain nothing which expressly or impliedly alters ⁴³⁰ the common-law rule, that education is a duty owed by the parent to the child.

The constitution of 1777 provided: "Schools shall be erected

in each county and supported at the general expense of the state, as the legislature shall hereafter point out and direct": Marbury & Crawford's Digest, 12. The constitution of 1798 provided: "The arts and sciences shall be promoted in one or more seminaries of learning, and the legislature shall, as soon as conveniently may be, give such further donations and privileges to those already established as may be necessary to secure the objects of their institution; and it shall be the duty of the general assembly at their next session to provide effectual measures for the improvement and permanent security of the funds and endowments of such institutions."

The code of 1861 provided for an educational fund and officers in whose hands its management should be placed, and the plan of its distribution among the several counties: Code 1861, secs. 1189-1218. The beneficiaries of this fund were children between the ages of six and eighteen years within the several counties, but "children of parents who are unable to educate them, children discarded by their parents, and indigent orphan children" were to be first provided for: Code 1861, sec. 1219.

A study of the history of the school law in this state, from 1785 when the legislature provided for a complete system of state education with a central seat of learning, down to the adoption of the code of 1861, will disclose occasional efforts to provide a system of free schools which would educate the entire population of the state without regard to the ability of the parent to furnish the child with education at his own expense: Prince's Digest, 866, 869. While the act of 1785 was primarily for the purpose of establishing "a public seat of learning," and did result in the establishment of the university of the state, the plan of the framers of the act was much broader than this, and it was distinctly provided that "all public schools instituted or to be supported by funds or public moneys, in this state, shall be considered as parts or members of the university, and shall be under the foregoing directions and regulations."

⁴³¹ An effort was made at a later day to provide a system of county academies and free schools, to carry out the intention of the framers of the act of 1785: Prince's Digest, 17. In 1819 and 1821 appropriations were made amounting to six hundred and seventy-five thousand dollars, the principal of which was required to be invested in bank stock, and the interest to be used for the support of academies and free schools throughout the state: Hatchkiss' Statutory Law of Georgia, 178, and note.

By the act of 1837 (Acts 1837, p. 94) the academic and poor

school funds were consolidated, and set apart for the support of a "general system of education by common schools." It is interesting to notice in this connection that one of the purposes for which this fund was to be expended was to purchase books and stationery for children whose parents were unable to furnish the same. This act with its amendments remained in force until 1840, when it was repealed: Acts 1840, p. 61. The common school system was abandoned, and the fund set apart for that purpose became a poor school fund. These efforts, made from time to time to establish a system of free schools for all of the children of the state, were not successful, the result in each instance being either a repeal of the appropriation, or a return to the poor school system.

The constitution of 1865 provided that: "The general assembly shall have power to appropriate money for the promotion of learning and science, and to provide for the education of the people, and shall provide for the early resumption of the regular exercises of the university of Georgia, by the adequate endowment of the same": Code 1868, sec. 4937.

The constitution of 1868 provided that "the general assembly, at its first session after the adoption of this constitution, shall provide a thorough system of general education to be forever free to all children of the state, the expense of which shall be provided for by taxation, or otherwise": Code 1873, sec. 5132.

The various acts of the general assembly passed from time to time to carry into effect these constitutional provisions, upon examination, will be seen to be entirely consistent with the scope of the constitution, which seems to provide a system of ⁴³² public education which should be free to all the children of the state.

The common-law rule being clear and unequivocal, that, while the duty rested upon the parent to educate his child, the law would not attempt to force him to discharge this duty, the child, so far as education is concerned, is completely at the mercy of the parent. Therefore, at common law, the child had no right to demand an education at the hands of the parent. This being the common-law rule, no law of this state, either constitutional or statutory, will be held to alter or abolish it, unless the terms of such law imperatively demand such construction. Every constitution that has been of force in this state, and every statute passed thereunder, from the first constitution adopted in 1777 to the one now of force, adopted one hundred years later, will be found to be in all of their varying provisions on the subject of education entirely consistent with the common-law rule, which

declares that it is the duty of the parent to educate his child, but at the same time leaves the child remediless if the duty is not discharged. The laws now in force only provide means for the parent to discharge the natural and moral duty which is upon him, and do not confer upon the child any right which he did not have at common law. At common law, the child's right to an education was dependent, not only upon the will, but upon the pecuniary ability of the parent. Under the present law in this state, the right of the child to an education is still dependent upon the will of the parent, but no longer dependent upon his pecuniary ability. It would be contrary to the policy of our law, based as it is upon the common law, to bestow upon the child in the matter of its education any right independent of the parent. It needs no argument to sustain the proposition that the father is, and ought to be, the head of the family; and the public has the right to look to him to control his children. A law which would take from him this control and deprive the public of the benefits to be derived from such control would be in conflict with our established institutions. A child in Georgia has the same right to an education at the hands of his parent that he had at common law, but no more. He could ⁴³³ not at common law require his parent to educate him; he cannot in Georgia compel his parent to provide an education for him. At common law, if his parent was willing but had not the means to carry out this will, the child must go without an education; in Georgia, if the parent is willing, the state provides a fund which is available to him, whether he be pecuniarily able to discharge the expense incident to an education, or not. If the parent in Georgia, notwithstanding the fund provided for the purpose of educating his children, is not willing to discharge the duty, even at the expense of the state, there is no power under the law to compel him to discharge it, and the doors of the courts are closed against the child, whether he comes in his own name, or comes in the name of another as his next friend. The parent in Georgia owes the duty to his child to educate him, and the state has furnished the means for the payment of the expense incident to the discharging of such duty; but the child is as completely at the mercy of the parent as he was at common law.

The law providing for a public school system was not intended to create any new right in, or give any new remedy to, a child. It being settled that the presence of the child in school depends absolutely upon the consent and will of the parent, the

school authorities are justifiable in dealing with the child in the light of this fact. As it is the purpose of the state to aid the parent in discharging a duty by furnishing a fund to pay the expense incident to discharging such duty, it is the right of the state, through its constituted authorities, to require of the parent that he shall do nothing inconsistent with the peace, good order, and authority of the system which is provided for his benefit. While it is hard upon the child to be deprived of the benefit of an education because his parent will not submit himself to the reasonable rules, regulations, practices, and customs incident to the system providing for the education of his child, it is no harder than the rule at common law, which left the child completely at the mercy of the parent's will, so far as obtaining an education was concerned; in fact, the status of the child is the same. At common law, he was at the mercy of an arbitrary parent ⁴³⁴ whether he should be placed at school or not; placed at school in Georgia, he is still at the mercy of an arbitrary parent who may so conduct himself as to deprive the child of the benefits to be derived from an education. There is no law which requires a parent to send his children to the public schools. A child who is entered at a public school must be required to conduct himself so as not to interfere with the discipline of the school. If this duty is incumbent upon the child, it would seem that for a stronger reason a similar duty would rest upon the parent who is the real beneficiary of the system. Public education which fails to instill in the youthful mind and heart obedience to authority, both private and public, would be more of a curse than a blessing; and the parent who in the schoolroom, or in the vicinity of the school, in the presence of the children, so acts as to create the impression that the true way of life is lawlessness and utter disregard of the rights of other people, should not only receive the punishment which the penal laws of the state would inflict upon him (Pen. Code, sec. 427), but should also be deprived of the benefit of the fund which is provided to pay an expense which natural and moral duty would otherwise require him to bear. We must not be misunderstood. We do not intend that the argument should go to the length that the school authorities would have the right to exclude the child from the benefits of the school because of improper conduct on the part of the parent, as to matters which are entirely disconnected with the school, or the attendance of the child, or the conduct or behavior of the parent with reference thereto. This right,

as we have seen, would only arise where the parent interferes in a matter involving the discipline or conduct of such child.

That the parent is guilty of acts which are unlawful and immoral would not necessarily have the effect of forfeiting his right to participate in the public school fund and justify the authorities in excluding the child. The right of the child to attend a public school is dependent upon the good conduct of the parent, as well as of the child. Both must submit to the reasonable rules and regulations of the school, and the parent must so conduct himself as not to destroy the influence ⁴³⁵ and authority of the school management over the children whenever he comes in contact with the school authorities, whether commissioners, officers, or teachers, under circumstances where his conduct would be likely to influence the conduct of his children. The schoolmaster has always stood in loco parentis for certain purposes, and notwithstanding the change from private schools into public schools, the schoolmaster of the present system is, and ought to be, in the place of the parent in a great many particulars. It is, therefore, a duty which the parent owes, not only to the master, but to the pupil himself—his child—that he who stands in the parent's shoes should not be impeded in discharging a duty which the parent has voluntarily placed upon him. Therefore, it necessarily follows that when the parent has taken advantage of the school fund to discharge the burden which he would otherwise have to carry himself, and has placed his child under the control of the schoolmaster thus provided, any misconduct on his part which would interfere with the master in discharging the duty which he owes to such child would result, under the present system, as it always did under the old system, in the exclusion of the child from the benefits to be derived through the services of the master.

There was read in the argument of this case a letter written by Ex-Chief Justice Bleckley to counsel for plaintiff in error, which contained an expression of his opinion upon the subject now under consideration. The words used by him so aptly express our views that we embody them herein as a part of our opinion: "Without having studied the question thoroughly, I have a strong impression that you are right in the fundamental merits of the case. If we had a compulsory school system, the right of the child would probably not be affected by the conduct of the parent; but our system looks to voluntary co-operation by the parent in carrying out the system, and where that

is withheld in a matter vital to some discipline, the child has no more right to remain in the school than it would have if the parent objected to its remaining. Neither the school authorities nor any court could compel the child for its own interest to enter the school or remain ⁴³⁶ in it without the parent's consent; and where that consent is not given on the terms rightly prescribed by the school board, it is the same as withheld, or not given at all. It is certain that parental discretion can be exercised in keeping the child out of school. Can it also be exercised in keeping it in, irrespective of considerations of sound discipline, though the invasion of discipline may be by the parent and not by the child? If so, the whole field of discretion is covered by the parent's will, and a very limited part of it by public authority. Where a scheme of work contemplates joint effort, if one of the parties refuses to co-operate on reasonable terms, the other may decline to continue the work on any other terms. So it seems to me."

The reasons which have brought us to the conclusion that the misconduct of the father might be such as to deprive the child of the benefit of the public schools will also apply where the father is dead, and the obligation rests upon the mother and she is guilty of such misconduct.

The question to be now considered is: What will be the effect of such misconduct by the mother in the lifetime of the father? While the obligation is upon the father to educate the child, and does not, in the lifetime of the father, in any manner rest upon the mother, still there is an obligation growing out of the relation of husband and wife, and parent and child, resting upon the wife and mother, demanding her co-operation with the husband in everything that is necessary for the welfare of the child. If the father is, by a good reason, required to abstain from conduct which would injure, and possibly destroy, the entire benefits of the system, the mother, for like reasons, must be required to desist, and her conduct may be a good reason for causing both the child and the father to lose the benefits of the school fund. This is especially true when we take into consideration the provision of the law of force in this state which declares that: "The husband is the head of the family, and the wife is subject to him; her legal existence is merged in the husband, except so far as the law recognizes her separately, either for her own protection, or for her benefit, or for the preservation of public order": ⁴³⁷ Civ. Code, sec. 2473. It is neither for her protection, nor for her benefit, nor for the preservation of public order, that an act

of the character above referred to should be declared to be her separate and independent act; but, on the other hand, public policy demands that the husband should be held responsible for her conduct, and be required to submit to the penalty which it would produce. The same reasons which require that there should be thrown around the father a restraining influence to prevent him from interfering with the operation and discipline of schools require that like restraints should be placed upon the mother.

In a case where the child is free from fault, and the father is obedient to the law, it does look extremely hard that the willful misconduct of the mother should thus bring distress upon two innocent persons; but it is better that they should suffer, than that an institution in operation for the public good should be entirely subverted and destroyed, as would certainly be the result if the mother of every child in attendance on the schools was permitted whenever disposed to enter the schoolroom and upbraid the teacher in the presence of the pupils.

In the case of *Spear v. Cumming*, 23 Pick. 224, 34 Am. Dec. 53, Chief Justice Shaw, in referring to the power and authority of the school committee under the law of Massachusetts, which corresponds to the board of education in this case, uses the following language: "The general charge and superintendence, in the absence of express legal provisions, includes the power of determining what pupils shall be received and what pupils rejected. The committee may, for good cause, determine that some shall not be received, as, for instance, if infected with any contagious disease, or if the pupil or parent shall refuse to comply with regulations necessary to the discipline and good management of the school."

In the case of *Ferriter v. Tyler*, 48 Vt. 444, 21 Am. Rep. 133, it was held that children might be lawfully excluded from public schools for absence contrary to the rules of the school, notwithstanding such absence was by the authority and command of the parents, who were Roman Catholics, and by direction of the priest, and for the purpose of attending religious services on one of the "holy days" of such church.

⁴³⁸ In the case of *Sherman v. Charlestown*, 8 Cush. 160, it was held that a child of licentious and immoral character could be excluded from the school, although such character was not manifested by any acts of licentiousness or immorality within the school. In the opinion Chief Justice Shaw says: "On general principles it would seem strange if, in the establishment of such

a great public institution as that of the public schools, in the benefits of which the whole community has so deep and vital an interest, there were no power vested anywhere sufficient to protect the schools thus established from the noxious influence of anyone whose presence and influence would be injurious to the whole and subversive of the purposes manifestly contemplated by their establishment. . . . There is no express provision in the law authorizing such exclusion; it results by necessary implication from the provisions of the law, requiring good discipline. It proves that the right to attend is not absolute and unqualified, but one to be enjoyed by all under reasonable conditions."

In the case of *Spiller v. Woburn*, 12 Allen, 127, it was ruled that the school committee of a town may lawfully pass an order that the school shall be opened each morning by reading from the Bible and prayer, and that during the prayer each scholar shall bow the head, unless his parents request that he shall be excused from doing so, and may lawfully exclude from the school a scholar who refuses to comply with such order, and whose parents refuse to request that he be excused from so doing.

In the case of *Bourne v. State*, 35 Neb. 1, a rule which made it the duty of the teacher to keep a record of the standing of each pupil in the studies pursued by him, his attendance and deportment, and to send each month by the pupil a written report of the same to his parent or guardian, and which required such parent or guardian to sign and return the same to the teacher, was held to be reasonable, and the willful refusal on the part of the parent to sign and return the same to the teacher was held to be a sufficient reason for excluding the child from school.

In the case of *Fessman v. Seeley* (Tex. Civ. App. March 6, 1895), 30 S. W. Rep. 268, it ⁴³⁹ was held to be a sufficient reason to exclude a child from school that the father refused to permit the teacher to whip him for misconduct and took no steps himself to correct him. It is true that the school in this case was a private and not a public school, and the right of the plaintiff was predicated upon the contract with the teacher; but it would seem that the same reasons which would constrain the courts to hold that such conduct would be a violation of a contract entered into between a parent and a schoolmaster providing for the education of a child would also require them to hold that such conduct would justify the school authorities in refusing to carry out the agreement impliedly made with the patrons of a public school through the medium of the public-school law.

In the case of *Bissell v. Davison*, 65 Conn. 183, it was held

that a requirement that all children attending the public schools should be properly vaccinated was a reasonable exercise of the police power of the state, and that the validity of the action taken by the school committee did not depend upon the actual existence of smallpox in the town, nor upon a reasonable apprehension of an epidemic of that disease, and that a child who had not been vaccinated was properly excluded from the school, and would not be reinstated by the courts upon the application of the parent. In the opinion Torrance, J., says: "The duty of providing for the education of the children within its limits, through the support and maintenance of public schools, has always been regarded in this state in the light of a governmental duty resting upon the sovereign state. It is a duty not imposed by constitutional provisions, but has always been assumed by the state; not only because the education of youth is a matter of great public utility, but also and chiefly because it is one of great public necessity for the protection and welfare of the state itself. In the performance of this duty, the state maintains and supports at great expense, and with an ever-watchful solicitude, public schools throughout its territory, and secures to its youth the privilege of attendance therein. This is a privilege or advantage, rather than a right in the strict technical sense of the term. This privilege is granted and is to be enjoyed upon such terms and ⁴⁴⁰ under such reasonable conditions and restrictions as the law-making power, within constitutional limits, may see fit to impose; and, within those limits, the question what terms, conditions, and restrictions will best subserve the end sought in the establishment and maintenance of public schools is a question solely for the legislature and not for the courts."

In the case of *State v. Webber*, 108 Ind. 31, 58 Am. Rep. 30, the school authorities of the city of Laporte adopted a rule requiring each pupil of the high school at stated intervals to employ a certain period of time in the study and practice of music, and for this purpose to provide himself with a prescribed book. The superintendent, notwithstanding a request from the parent that his child might be excused from this exercise, required the pupil to take part in the musical exercises of the school, and, upon his refusal to obey, suspended him from school. The only cause or reason assigned by the parent for requiring his son to disobey the rule was that he did not believe it for the best interest of his son to participate in the musical exercises of the school, and did not wish him to so. The suspension of the pupil was sustained as lawful and authorized, the court using the following language:

"The important question arises, Which should govern the public high school of the city of Laporte, as to the branches of learning to be taught and the course of instruction therein, the school trustees of such city, to whom the law has confided the direction of these matters, or the mere arbitrary will of the relator, without cause or reason in its support? We are of opinion that only one answer can or ought to be given to this question; the arbitrary wishes of the relator, in the premises, must yield and be subordinated to the governing authorities of the school [of the] city of Laporte, and their reasonable rules and regulations for the government of the pupils of its high school."

In the case of *Duffield v. Williamsport*, 162 Pa. St. 476, where a rule of the school board required that pupils should undergo vaccination, the exclusion from the school of a pupil whose parent refused to have him vaccinated was held to be lawful, the rule requiring vaccination being enforced ⁴⁴¹ during the prevalence of an alarm over the report that there was a case of smallpox in the city.

In the case of *Guernsey v. Pitkin*, 32 Vt. 224, 76 Am. Dec. 171, a requirement by the teacher of a district school that the pupils in grammar should write English compositions was held a reasonable one, and expulsion of a pupil who refused to comply with this requirement and produced no request from his parents asking that he be excused was held to be authorized.

In the case of *Lander v. Seaver*, 32 Vt. 114, 76 Am. Dec. 156, it was held that a schoolmaster has in general no right to punish a pupil for misconduct committed after his dismissal from school for the day and return to his home, yet he may, on the pupil's return to school, punish him for any misbehavior, though committed out of school, which has a direct and immediate tendency to injure the school and to subvert the master's authority.

In the case of *King v. Jefferson City School Board*, 71 Mo. 628, 36 Am. Rep. 499, the court had under consideration the legality of the suspension from the public school of a pupil who had become amenable to a rule which required that "any pupil absent six half-days in four consecutive weeks without satisfactory excuse shall be suspended from school." In the opinion, Napton, J., says: "It is said that occasional absences from school on the part of the pupil, or truancy as it is familiarly termed, is of no importance to anyone except the pupil or his parents, and its indulgence is therefore not to be attended with such punishment as suspension or expulsion from the school entirely; that every child has a right to the public school, and that that

right cannot be taken away by a rule of the board; that such rule is subversive of the object of our system of common schools, which was designed to throw open and leave open the doors of the school to all children of the proper age, and give them an opportunity of acquiring such education as will fit them for the after duties of life. This is true, but this right of attending school necessarily requires, when the school is joined, and whilst such attendance continues, a submission to the regulations of the school. . . . The pupil, it is urged, is at liberty to be absent when he pleases, and such absence is a matter solely between him and ⁴⁴² his parents. . . . Such absences, when without excuse, are the fault of the parents, whose business it is to see that the attendance of their child is regular, unless prevented by causes which will, of course, be an excuse under the rule now in question."

It is true that in all of the cases cited some act was done by the child himself, and therefore they are not exactly identical in their facts with the case under consideration. But the act of the child was generally in obedience to a command of the parent, and the exclusion or suspension of the child from school was brought about by the wrongful conduct of the parent in commanding the child to do the act which was illegal, or in directing the child to refrain from doing that which was lawfully required. So that it may be fairly said that in the cases cited the child was deprived of the benefit of the school by the act of the parent. It will be also gathered from these cases that it is not absolutely essential that there should be a rule which has been in terms violated either by the child or by the parent. If the act complained of is such that in itself it would be subversive of the good order and discipline in the school, then the mere failure of the board of education to declare that unauthorized which every intelligent man must know could not be allowed, would not prevent the school authorities from dealing with a person who was guilty of such an act. If, however, the act in itself be harmless, but may be harmful on account of the peculiar conditions surrounding the school and its authorities, then there should be a prescribed rule before the act could be complained of as one which would forfeit the right to patronize the schools. It would seem to require no argument to sustain the proposition, that an act of disorder in the schoolroom calculated to bring into contempt the authority of the school, as well as the individual in charge for the time being, should be met with such punishment as would be calculated to impress the pupils with the importance

of obedience and respect to constituted authority. Children are too much disposed naturally to look with contempt upon authority, especially when represented by a schoolmaster, and parents should be restrained from encouraging this tendency, ⁴⁴³ so dangerous in its nature to private and public welfare. It is admitted by all that in such a case prosecution under the criminal laws of the state would be justified and proper. This would satisfy the public wrong growing out the violation of the penal laws, but another, and it may not be unwise to say, a greater wrong has been done than the mere infraction of the criminal law. The only adequate remedy for such a wrong is one which will cause the parents of the state to understand that that which is given to them for their benefit primarily, and for the benefit of their children secondarily, will be withdrawn from them and their children whenever they do an act which in its effect will be prejudicial to the system which is maintained for their benefit. We are aware that it has been held that where a child is excluded unlawfully from a public school, he has, in some cases, a right of action against the public officers, and that the right of action is not in the parent: *Donahoe v. Richards*, 38 Me. 376, 379; *Stephenson v. Hall*, 14 Barb. 222. The right to recover in such action is limited to cases where the public officials acted wantonly or maliciously: *McCormick v. Burt*, 95 Ill. 263; 35 Am. Rep. 163; *Dritt v. Snodgrass*, 66 Mo. 286; 27 Am. Rep. 343. In cases, however, where application was made for reinstatement of the child in the school, it will be generally found that the application was made in the name and in behalf of the parent or guardian: *Rulison v. Post*, 79 Ill. 567; *State v. Board of Education*, 63 Wis. 234; 53 Am. Rep. 282; *Holman v. School District*, 77 Mich. 605; *Bind v. Klinge*, 30 Mo. App. 285; *Trustees v. People*, 87 Ill. 303; 29 Am. Rep. 55.

That the child should have a right of action for being maliciously and wantonly deprived of an education after the parent has entered him in the school is not in conflict with the principal which we contend for in this case. If the child is wantonly and maliciously excluded from the school, his right of action is entirely consistent with the right which exists in the parent to compel his reinstatement. That the child is damaged there can be no question. His parent is under a duty to educate him; his parent has lawfully placed him at the place provided by law for this education; the parent therefore, and no one but the parent, will be considered ⁴⁴⁴ by the law when the question of entering the school and being kept therein is under consideration. The state

will not allow anyone except the parent to decide the question as to whether the child shall be educated. If the parent decides that the child shall be educated, and the school authorities refuse to admit, or wrongfully exclude him from the benefits of the system provided, the courts will entertain an application to compel admission or reinstatement from no one except the parent or guardian, or some other person occupying a like relation to the child. While it is the act of the parent or guardian which places the child in the school and puts him in a position where he can obtain the benefits of the system, this does not prevent a duty from arising on the part of the school authorities toward the child to abstain from unlawful conduct which would deprive the child of the benefit which the act of the parent has secured to him. The moment the child is placed in the school this duty arises. A breach of this duty will be a tort for which the child can recover in a proper action against the person wantonly and maliciously depriving him of the benefits which he would receive from the school: Civ. Code, sec. 3807.

The authorities of the public schools under the law owe a duty to the public to admit and keep within the schools all children who come within the lawfully prescribed rules and whose parents or guardians see fit to enter them. When, therefore, such school authorities willfully, wantonly, and maliciously refuse to admit such children, a public wrong is committed, which may be remedied, so far as the public is concerned, by indictment for malpractice, or other appropriate remedy. Out of this breach of duty damage arises to the parent, as well as to the child. The parent, therefore, has the right to appeal to the courts to compel the child to be admitted or reinstated, as the case may be, and also to appeal to the courts by his action for damages for the amount which he would be required to expend in the education of his child. The child would also have a right against the individuals thus wantonly and maliciously depriving him of the benefit which is secured to him by the law in the event the parent ⁴⁴⁵ sees proper to enter him in the school: Broom's Common Law, 9th London ed., 757-759.

When the law requires one to do an act for the benefit of another, or to forbear the doing of that which may injure another, though no action be given in express terms, upon the accrual of damage the party may recover: Civ. Code, sec. 3809. It follows, therefore, that when a parent enters his child in the public schools, the law requires that the authorities of the school shall do each and every act required by the law which will be for the

benefit of the child, and also that the authorities shall refrain from doing any act which will injure the child. If the school authorities wantonly and maliciously refuse to discharge the duty thus imposed upon them, the child will have a right of action against the individuals who commit the wrongful act.

Our conclusion is, that the board of education, either in the absence of a rule, or in furtherance of a prescribed rule, had the right to exclude from the schools under its control any child whose parent, in the schoolroom or its vicinity in the presence of such child and other pupils, conducted himself or herself in such manner that their acts were calculated to produce disorder in the school and break down and destroy its discipline. Under the facts set up in the answer of the board of education in this case, it was not only authorized, but it was its duty, to suspend the children of the defendants in error from the school. The trial judge erred in granting the mandamus and reinstating the children.

Cases and authorities which, though not in all respects pertinent to the matter dealt with in the above opinion, relate to questions arising out of "school laws": *Learock v. Putnam*, 111 Mass. 499; *Roe v. Deming*, 21 Ohio St. 666; *Anderson v. State*, 3 Head, 455; 75 Am. Dec. 774; *Fertick v. Michener*, 111 Ind. 472; 60 Am. Rep. 709; *State v. Osborne*, 24 Mo. App. 309; *Board of Education v. Minor*, 23 Ohio St. 211; 13 Am. Rep. 233; *Davis v. Boston*, 133 Mass. 103; *Churchill v. Fewkes*, 13 Ill. App. 520; *Burdick v. Babcock*, 31 Iowa, 562; *King v. Jefferson School Board*, 71 Mo. 628; 36 Am. Rep. 499; *Sewell v. Board of Education*, 29 Ohio St. 89; *Peck v. Smith*, 41 Conn. 442; *Board of Education v. Holston*, 32 Ill. App. 300; *Mack v. Kelsey*, 61 Vt. 399; 446 *Perkins v. School Dist.*, 56 Iowa, 476; *Patterson v. Nutter*, 78 Me. 509; 57 Am. Rep. 818; *State v. Mizner*, 45 Iowa, 248; 24 Am. Rep. 769; *Stevens v. Fassett*, 27 Me. 266; *Heritage v. Dodge*, 64 N. H. 297; *Deskins v. Gose*, 85 Mo. 485; 55 Am. Rep. 387; *Hutton v. State*, 23 Tex. App. 364; *Balding v. State*, 23 Tex. App. 172; *Commonwealth v. Seed*, 5 Clark (Pa.), 78; *Danenhoffer v. State*, 69 Ind. 295; 35 Am. Rep. 216; *Vanvactor v. State*, 113 Ind. 236; 3 Am. St. Rep. 645; 2 Kent's Commentaries, 203; *Morrow v. Wood*, 35 Wis. 59; 17 Am. Rep. 271; *Reeves on Domestic Relations*, 4th ed., 357, 358; *Russell v. Lynnfield*, 116 Mass. 366; *Hodgkins v. Rockport*, 105 Mass. 476; *Scott v. School Dist.*, 46 Vt. 452; *Sheehan v. Sturges*, 53 Conn. 481; *Trustees v. People*, 87 Ill. 303; 29 Am. Rep. 55; *Murphy v. Directors*, 30 Iowa, 429; *Perkins v. Directors*, 56 Iowa, 476; *Parker*

v. School District, 5 Lea, 525; Cooper v. McJunkin, 4 Ind. 290; Hathaway v. Rice, 19 Vt. 102; Ward v. Flood, 48 Cal. 36; 17 Am. Rep. 405; Huse v. Lowell, 10 Allen, 150; Kidder v. Chellis, 59 N. H. 473; Metcalf v. State, 21 Tex. App. 174; Thompson v. Beaver, 63 Ill. 353; Roberson v. Trout, 17 Ill. App. 386; State v. Board of Education, 63 Wis. 234; 53 Am. Rep. 282; Abeel v. Clark, 84 Cal. 226; Moore v. Monroe, 64 Iowa, 367; 52 Am. Rep. 444; Bishop's Noncontract Law, secs. 593-596; Weaver v. Devendorf, 3 Denio, 120; Reed v. Conway, 20 Mo. 52; Tift v. Tift, 4 Denio, 175; State v. School Dist., 31 Neb. 552; Wilkes v. Dinsman, 7 How. 89; State v. Burton, 45 Wis. 155; 30 Am. Rep. 706; Norton v. Tinmouth School Dist., 37 Vt. 521; Blanchard v. Stearns, 5 Met. 298; Griffin v. Rising, 11 Met. 339; Stewart v. Southard, 17 Ohio 402; 49 Am. Dec. 463; Downer v. Lent, 6 Cal. 94; 65 Am. Dec. 489; Hines v. Lockport, 50 N. Y. 236; Matter of Church St., 49 Barb. 455; Jordan v. Hanson, 49 N. H. 199; 6 Am. Rep. 508; Gregory v. Brooks, 37 Conn. 365; Wilson v. Mayor, 1 Denio, 599; 43 Am. Dec. 719; Kendall v. Stokes, 3 How. 87; Roberts v. Boston, 5 Cush. 198; People v. Board of Education, 18 Mich. 400; Allen v. Blunt, 3 Story, 742; Lincoln v. Hapgood, 11 Mass. 350; Wheeler v. Patterson, 1 N. H. 88; 8 Am. Dec. 41; Jenkins v. Waldron, 11 Johns. 114; 6 Am. Dec. 359; Rail v. Potts, 8 Humph. 225; Capen v. Foster, 12 Pick. 485; 23 Am. Dec. 632; Gates v. Neal, 23 Pick. 308.

Judgment reversed.

Atkinson and Little, JJ., dissenting, the other justices concurring.

Causes for which Children may be Excluded from the Public Schools.

Suspension and Expulsion.—It is undoubtedly the imperative duty of every principal or teacher in charge of a public school to maintain discipline and good order therein, and to require of all pupils a faithful performance of their duties. As such teacher is responsible for the discipline of his school, he has the right to formulate and enforce reasonable rules and regulations for its good government; and to enable him to discharge his duties effectually, he must necessarily have the power to enforce prompt obedience to his lawful commands. Hence, it follows that he must have inherent power to immediately suspend or expel a pupil for any breach of reasonable discipline while at school, or for any misconduct injurious to the good government or morals of the other pupils. Although his action in depriving a pupil of the privileges of the school is generally subject to review by the trustees, board of education, or other governing body of the school district, the teacher undeniably has the power, in the first instance, to suspend a pupil

for an infraction of reasonable rules, or for other conduct injurious to the discipline or morality of the school. Nowhere has the law in this respect been more fully or clearly stated, than in *State v. Burton*, 45 Wis. 155, 30 Am. Rep. 706, where Mr. Justice Lyon, in delivering the opinion of the court, said: "While the principal or teacher in charge of a public school is subordinate to the school board or board of education of his district or city, and must enforce rules and regulations adopted by the board for the government of the school and execute all its lawful orders in that behalf, he does not derive all his power and authority in the school and over his pupils from the affirmative action of the board. He stands for the time being in loco parentis to his pupils, and, because of that relation, must necessarily exercise authority over them in many things concerning which the board may have remained silent. In the school, as in the family, there exist on the part of the pupils the obligations of obedience to lawful commands, subordination, civil deportment, respect for the rights of other pupils, and fidelity to duty. These obligations are inherent in any proper school system, and constitute, so to speak, the common law of the school. Every pupil is presumed to know this law, and is subject to it, whether it has or has not been re-enacted by the district board in the form of written rules and regulations. Indeed, it would seem impossible to frame rules which would cover all cases of insubordination and all acts of vicious tendency which the teacher is liable to encounter daily and hourly. The teacher is responsible for the discipline of his school, and for the progress, conduct, and deportment of his pupils. It is his imperative duty to maintain good order, and to require of his pupils a faithful performance of their duties. If he fails to do so, he is unfit for his position. To enable him to discharge his duties effectually, he must necessarily have the power to enforce prompt obedience to his lawful commands. For this reason, the law gives him the power, in proper cases, to inflict corporal punishment upon refractory pupils. But there are cases of misconduct for which such punishment is an inadequate remedy. If the offender is incorrigible, suspension or expulsion is the only adequate remedy. In general, no doubt, the teacher should report a case of that kind to the proper board for its action in the first instance, if no delay will necessarily result from that course prejudicial to the best interests of the school. But the conduct of the recusant pupil may be such that his presence in the school for a day or an hour may be disastrous to the discipline of the school and even to the morals of the other pupils. In such a case, it seems absolutely essential to the welfare of the school that the teacher should have the power to suspend the offender at once from the privileges of the school; and he must necessarily decide for himself whether the case requires that remedy. If he suspends the pupil, he should promptly report his action and his reasons therefor to the proper board. It will seldom be necessary for the teacher in charge of the district school to exercise this power, because usually he can communicate readily with the district board, and obtain the direction and order of the board in the matter. But where the government of a public school

is vested in a board of education, with a more numerous membership than district boards, and which holds stated meetings for the transaction of business, the facilities for speedy communication with the board may be greatly decreased, and more time must usually elapse before the board can act upon the complaint of the teacher. In those schools, the occasions which require the action of the teacher in the first instance will occur more frequently than in the district schools. We conclude, therefore, that the teacher has, in a proper case, the inherent power to suspend a pupil from the privileges of his school, unless he has been deprived of the power by the affirmative action of the proper board": *State v. Burton*, 45 Wis. 154-157; 30 Am. Rep. 706. In *Scott v. School District*, 46 Vt. 452, 457, the court said: "The teacher could not perform the duties of her employment without maintaining proper and necessary discipline in the school, and when all her other means for doing so failed in respect to the boy, it was her right, and might be her duty, to expel him to save the rest of the school from being injured by his presence. It was not the duty of the teacher, under the contract, to teach the school without maintaining proper and necessary discipline in it, and if the committee insisted that she should have the boy there, when she could not have him there, and have the discipline too, it was equivalent to insisting that she could teach the school without the discipline, which she was not bound to do." In this case, it was held that, under the circumstances, the committee had no legal right to discharge the teacher for the reason that she had expelled a pupil against its wishes and without its consent: *Scott v. School District*, 46 Vt. 452. In *Parker v. School District*, 5 Lea, 525, the same rule was maintained.

A Tennessee statute empowered a teacher to suspend unruly pupils, but reserved the right to expel them to the school directors. And in the case cited the court said that "from these provisions it is apparent that a teacher of a public school, while he has the right to suspend a pupil until the case is decided by the directors, cannot, without the concurrence of the directors, permanently deprive a pupil of the privileges of the school. The power to dismiss the pupil is alone given to the directors, and their decision must control the refusal of a teacher, to receive and admit to the privileges of the school a pupil whom the directors decide shall be received, or an attempt upon the part of the teacher to dismiss a pupil whom the directors decide shall not be dismissed, is, we think, such improper conduct as would authorize the directors to dismiss the teacher, for this would be to deny to the pupils the privileges of the public schools secured to them by the law": *Parker v. School Dist.*, 5 Lea, 528.

School Boards.—School trustees or other educational authorities undoubtedly have the power to adopt appropriate rules and regulations for the government of the schools under their control, and it is not necessary that all rules for the discipline and government of such schools shall be made a matter of record by the school board, or that every act, order, or direction affecting their management shall be authorized or confirmed by a formal vote; but any reasonable rule adopted by a superintendent or a teacher, not inconsistent

with some statute or some other rule prescribed by a higher authority, is binding upon the pupils. It is always a question of law for the courts to determine whether such rules are reasonable: *Fertich v. Michener*, 111 Ind. 472; 60 Am. Rep. 709. The board of directors or board of education having control of the government of a school have no power to provide for the suspension or expulsion of pupils except for a breach of discipline, or an offense against good morals: *Perkins v. Board of Directors*, 56 Iowa, 476; *Rulison v. Post*, 79 Ill. 567. But the school committee has authority to expel a pupil from the public school for a violation of reasonable rules and misconduct which injures the discipline and management of the school: *Hodgkins v. Rockport*, 105 Mass. 475. While the board of directors of a school have power to dismiss a pupil for gross immorality, or for persistent violation of the regulations of the school, it has no power to dismiss or suspend for conduct short of this, as for acts done out of school which, though they may have a tendency to incite ridicule of the directors, and insubordination in the school, are not immoral, or prohibited by any rule or regulation: *Murphy v. Board of Directors*, 30 Iowa, 429.

The reasonable requirements and rules of a teacher must be obeyed by his pupils, and expulsion from school is the proper remedy for persistent disobedience: *Guernsey v. Pitkin*, 32 Vt. 224; 76 Am. Dec. 171. Because the board of school directors fail to make necessary rules and regulations for the government of the schools within their jurisdiction, a pupil may not with impunity transgress the unwritten but well-defined rules of conduct prescribed by a common sense of decency and propriety, and when such board deem it unnecessary or neglect to make necessary rules, the teacher has power to adopt and enforce them. Hence the power of expulsion given to the directors is not limited to cases of infraction of such rules as they may have theretofore adopted, but extends to cases where they may have become satisfied that the interests of the school require the expulsion of a pupil on account of his gross misbehavior: *State v. Hamilton*, 42 Mo. App. 24. A rule prescribed by a school superintendent with the sanction of the trustees, that the pupils in a certain school shall at stated intervals employ a stated period of time in the study and practice of music, and provide themselves with a certain book therefor, is a reasonable regulation on its face, and unless shown to be in fact unreasonable, or a satisfactory excuse for failing to comply therewith is given, mandamus will not lie to compel the school authorities to readmit a pupil who has been suspended for disobedience thereof: *State v. Webber*, 108 Ind. 31; 58 Am. Rep. 30. It is within the discretion of the board of school directors to adopt a rule requiring a pupil to inform them of the name, given to him by another pupil, of a party who has been guilty of a gross breach of the school rules, and, upon his refusal, to suspend him, and he may, by his gross misconduct toward the board, forfeit his right, if any, to reinstatement: *Board of Education v. Helston*, 32 Ill. App. 300. The school board may lawfully adopt a rule that the schools within their control shall be opened each morning with bible reading and prayer, and that during prayer each

scholar shall bow the head, unless his parents shall request that he be excused therefrom, and they may lawfully expel from school a pupil who refuses to comply with such rule and whose parents refuse to request that he shall be excused from such compliance: *Spiller v. Inhabitants of Woburn*, 12 Allen, 127. To the same effect: *McCormick v. Burt*, 95 Ill. 263; 35 Am. Rep. 163; *Donahoe v. Richards*, 38 Me. 376.

It is competent for boards of school directors to provide by rules that pupils may be suspended or expelled from school in case they shall be tardy or absent, except for sickness or other unavoidable cause, and without a reasonable excuse, a certain number of times within a fixed period: *Burdick v. Babcock*, 31 Iowa, 562; *Churchill v. Tewkes*, 13 Ill. App. 520; *King v. Jefferson City School Board*, 71 Mo. 628; 36 Am. Rep. 499; *Russell v. Lynnfield*, 116 Mass. 365. A rule which empowers expulsion of the scholar from school for absence contrary to its rules is valid, though such absence is caused by the command of the Roman Catholic priest and parents of the pupil, and for the purpose of attending religious services on a holy day of the church: *Ferriter v. Tyler*, 48 Vt. 444; 21 Am. Rep. 133. A rule requiring tardy pupils to remain in the hall of the school building, which is provided with heat, or in the office of the principal until the opening exercises, lasting from ten to fifteen minutes, are concluded, in order that such exercises may not be interrupted or disturbed, is in itself a reasonable regulation, and may be enforced by locking the schoolroom doors during such exercises: *Fertich v. Michener*, 111 Ind. 472; 60 Am. Rep. 709. In speaking of this and similar rules, the court, in the last-cited case, said: "No rule, however reasonable it may be in its general application, ought to be enforced when to enforce it will inflict actual or unnecessary suffering upon the pupil. Rules are often adopted inflicting a penalty for absence from school without proper or some prescribed leave, and rules of that class have always, so far as our information extends, been held to be reasonable and sometimes necessary school regulations, and yet such rules could not be lawfully enforced against a pupil detained from school by sickness, a violent storm, a death in the family, or any physical inability to attend": *Fertich v. Michener*, 111 Ind. 484; 60 Am. Rep. 709. A rule adopted by a teacher requiring pupils to write compositions is reasonable, and the teacher may expel a scholar who persistently refuses to comply with the rule: *Guernsey v. Pitkin*, 32 Vt. 224; 76 Am. Dec. 171. A rule requiring pupils to be prepared with a rhetorical exercise at a certain time, unless excused because of sickness or other reasonable cause, and providing for suspension, for failure to comply with the rule, is reasonable and may be enforced by the teacher with the consent of the board of education: *Sewell v. Board of Education*, 29 Ohio St. 89. Under the doctrine that all regulations adopted for the government of schools must be reasonable, it has been held that a rule requiring every scholar, on returning from recess, to bring in a stick of wood for the fire, is unreasonable and not necessary to the government of the school. Hence suspension or expulsion from the

school for failure or refusal to comply with such rule is illegal: *State v. Board of Education*, 63 Wis. 234; 53 Am. Rep. 282.

Before a pupil can be suspended or expelled from a public school he must be guilty of some willful or malicious act or gross misconduct detrimental to the school, or he must be persistent in his disobedience of the proper and reasonable rules and regulations of the school, but a boy ten years old cannot be suspended for a purely careless act, as for carelessly breaking the light of a glass in a window in the school building, and when his suspension is made dependent upon the replacement of the glass or his making satisfaction therefor, his reinstatement may be compelled by mandamus: *Holman v. Trustees*, 77 Mich. 605. A rule requiring that no pupil shall attend social parties during the school term, and expulsion for violation of such rule by a pupil by permission of his parents, is unreasonable and unlawful: *Dritt v. Snodgrass*, 66 Mo. 286; 27 Am. Rep. 343; *State v. Osborne*, 24 Mo. App. 309. "The directors of a school district are not authorized to prescribe a rule which undertakes to regulate the conduct of the children within the district who have a right to attend the school, after they are dismissed from it and remitted to the custody or care of the parent or guardian. They have the unquestioned right to make needful rules for the control of the pupils while at school and under the charge of the person who teaches it, and it would be the duty of the teacher to enforce such rules when made. While in the teacher's charge, the parent would have no right to invade the schoolroom and interfere with him in its management. On the other hand, when the pupil is released and sent back to his home, neither the teacher nor directors have the authority to follow him thither, and govern his conduct while under the parental eye": *Dritt v. Snodgrass*, 66 Mo. 286; 27 Am. Rep. 343-350; *State v. Osborne*, 24 Mo. App. 309.

Under the rule that a pupil cannot be expelled from a public school for any reason except disobedient, refractory, or incorrigibly bad conduct, and only for this after all other means have failed, a pupil who, under direction of his parents, refuses to study book-keeping, and thereby violates a rule of the school, for which he is expelled, is unlawfully expelled, on the ground that such rule is unreasonable and beyond the power of the school directors to make, especially when such course of study is not prescribed by law: *Rulison v. Post*, 79 Ill. 567. The suspension of a pupil is unlawful when he has been suspended for alleged misconduct, without giving the pupil an opportunity, requested and refused, to be heard upon the question of fact involved in his alleged misbehavior, by the board of school directors: *Bishop v. Inhabitants of Rowley*, 165 Mass. 460.

Exclusion—Color.—In *Ward v. Flood*, 48 Cal. 36, 17 Am. Rep. 403, it was held that the privilege accorded to a child, of attending the public schools, is not a privilege appertaining to a citizen of the United States as such, nor can any person demand admission into such schools on the mere status of citizenship, but the opportunity of instruction in public schools given by statute to the youth of the state is a legal right, as much so as a vested right in property.

The fourteenth amendment to the constitution of the United States, which forbids a state "to deny to any person within its jurisdiction the equal protection of the laws," does not create any new legal rights, but operates upon them as it found them established, and declares that, such as they are in each state, they shall be enjoyed by all persons alike. Hence the legislature cannot, while providing for a public school system for the youth of the state, exclude from its benefits children merely because they are colored or of African descent. A law providing for the education of children of African descent in separate schools, to be provided at public expense the same as other public schools, is legal and valid, and when it exists colored children may be excluded from public schools established for white children, provided schools for colored children are established affording the same facilities for education, but, if the latter schools are not established, colored children cannot be excluded from schools kept for white pupils: *Ward v. Flood*, 48 Cal. 36; 17 Am. Rep. 405. It seems to be well settled that unless there is some statutory or constitutional provision prohibiting it, the governing body of a school district may provide separate schools for white and colored children, and may compel them to attend the school provided, but, unless such school is provided, colored children, no matter what their nationality, cannot be excluded from the public schools on account of race prejudice, and this, regardless of the provisions of the fourteenth amendment to the constitution of the United States: *Roberts v. Boston*, 5 Cush. 198; *State v. Duffy*, 7 Nev. 342; 8 Am. Rep. 713; *State v. Blain*, 36 Ohio St. 429. A statute which attempts to peremptorily exclude negro children from the public schools is unconstitutional and void: *State v. Duffy*, 7 Nev. 342; 8 Am. Rep. 713. In Illinois, the statute provides that boards of education shall provide schools for the education of all children between the ages of six and twenty-one years in their district, and under such law it has been held that colored children are placed on the same footing with white children and admissible to the public schools on the same terms. An attempt to exclude them from any such school on account of race or color is illegal and void. "The free schools of the state are public institutions, and in their management and control the law contemplates that they should be so managed that all children within the district between the ages of six and twenty-one years, regardless of race or color, shall have equal and the same right to participate in the benefits to be derived therefrom. While the directors very properly have large and discretionary powers in regard to the management and control of schools, in order to increase their usefulness, they have no power to make class distinctions, neither can they discriminate between scholars on account of their color, race, or social position." Hence the directors have no power to maintain a separate school to instruct a few colored children when they can be taught at the schoolhouse with the white children: *Chase v. Stephenson*, 71 Ill. 383. To the same effect is *People v. Board of Education*, 127 Ill. 613. The constitution and laws of Iowa provide for equal common school privileges for all of the youth of the state between the age of five and twenty-one years, and

under such legislation it has been held that while a board of school directors has a large and well-defined discretion, operative upon all as to the residence or qualification of children to entitle them to admission to each particular school, they cannot deny a youth admission to any particular school because of his color, nationality, religion, or the like. Nor have they any discretionary power to require colored children to attend a separate school: *Clark v. Board of Directors*, 24 Iowa, 266. Followed in *Smith v. Board of Directors*, 40 Iowa, 518, and *Dove v. Independent School Dist.*, 41 Iowa, 689, each case holding that a pupil, otherwise eligible, cannot be excluded from the public schools on account of his color, nor, if colored, can he be compelled to attend a separate school. The same ruling is maintained in *People v. Board of Education*, 18 Mich. 400. Section 1662 of the Political Code of California provides that every school, unless otherwise provided by law, must be open for the admission of all children between six and twenty-one years of age residing in the district, and after the adoption of this section, a Mongolian or Chinese child applied for admission to a public school for white children established in the city and county of San Francisco. Its admission was refused by the teacher, and an application for a writ of mandate was made to compel admission. The appellate court, in *Tape v. Hurley*, 66 Cal. 473, speaking by Mr. Justice Sharpstein, held that such child could not be excluded from the school for white children, and said: "The clause is broad enough to include all children who are not precluded from entering a public school by some provision of law, and we are not aware of any law which forbids the entrance of any children of any race or nationality. The legislature not only declares who shall be admitted, but also who may be excluded, and it does not authorize the exclusion of any one on the ground upon which alone the exclusion of the respondent here is sought to be justified. The vicious, the filthy, and those having infectious or contagious diseases may be excluded without regard to their race, color, or nationality." Again in *Wysinger v. Crookshank*, 82 Cal. 588, it was held that under this provision of law it was not within the power of a board of education to establish public schools exclusively for children of African descent, or to exclude them from the public schools established for white children. In *Pierce v. Union District School Trustees*, 46 N. J. L. 76-78, Mr. Justice Dixon, in speaking of an attempt to exclude colored children from the public schools, said: "The ground of their exclusion in the present instance is manifested by the state of the case agreed upon. Of the four public schools in Burlington, one is for colored children only, and three are exclusively for white children, and it was into schools of the latter sort that the relator's children sought entrance. He is a mulatto, and therefore his children were excluded. Is exclusion upon that ground permissible? We need not consider this question in the broad aspects presented by counsel. The power of the legislature to enact the law which has been promulgated on the subject is indubitable, and the law itself is unmistakably explicit. It is that no child between the age of five and eighteen years of age shall be excluded from any public school in this state, on account of

his or her religion, nationality, or color.' This statute made the respondent's refusal illegal."

Vaccination.—Statutes requiring that every pupil attending the public schools shall present satisfactory evidence of vaccination before he or she shall attend school, and providing that all pupils shall be excluded from such schools unless they have been properly vaccinated, are constitutional and valid: *Bissell v. Davidson*, 65 Conn. 183; *Abeel v. Clark*, 84 Cal. 226; *Duffield v. Williamsport School Dist.*, 162 Pa. St. 476; *Matter of Walters*, 84 Hun, 457. Under such statutes school directors may, in the exercise of a sound discretion, exclude from the public schools pupils who have not been vaccinated, although smallpox is not prevalent at the time: *Duffield v. Williamsport School Dist.*, 162 Pa. St. 476; *Abeel v. Clark*, 84 Cal. 226; *Bissell v. Davison*, 65 Conn. 183; *Matter of Walters*, 84 Hun, 457. In *Bissell v. Davison*, 65 Conn. 183, it was held that a statute requiring the vaccination of all school children as a prerequisite to attending school was but a reasonable exercise of the police power of the state, and that the validity of the action taken by a school committee excluding all pupils not vaccinated does not depend upon the actual existence of smallpox in the community, nor upon a reasonable apprehension of an epidemic of that disease, and in *Matter of Rebenack*, 62 Mo. App. 8, it was held that independently of any express statute on the subject, a board of education has authority under its general power to make rules for the government of the public schools within its jurisdiction to require the vaccination of children in attendance at such schools and to refuse admittance to those who refuse to be vaccinated. In Illinois, there is no statute requiring vaccination as a condition precedent to the exercise of the legal right of children to attend the public schools, and in that state it has been held that the power to compel the vaccination of children as a prerequisite to the exercise of their right to attend school can be derived from no other source than the general police power of the state, and can be justified upon no other ground than as a necessary means of preserving the public health. Hence a rule adopted by a state board of health requiring children to be vaccinated as a prerequisite to the exercise of the right to attend public school is not reasonable, when smallpox does not exist in the community, and there is no cause to apprehend its appearance, and the directors of a public school have no right, either under their own rules or by order of such board of health, to exclude children from such school who refuse to be vaccinated, unless it is necessary, in cases of emergency, or reasonably appears necessary, to prevent the contagion of smallpox. A remote fear of the disease does not justify such exclusion: *Potts v. Breen*, 167 Ill. 67, 59 Am. St. Rep. 262, affirming *Potts v. Breen*, 60 Ill. App. 201.

Other Grounds of Exclusion.—The general charge or superintendence of public schools vested in a board of education or school committee, "in the absence of express legal provisions, includes the power of determining what pupils shall be received, and what pupils rejected. The committee may, for a good cause, determine that some shall not be received, as, for instance, if infected with any contagious disease, or if the pupil or parent shall refuse to comply

with regulations necessary to the discipline and good government of the school: *Spear v. Cummings*, 23 Pick. 224; 84 Am. Dec. 53. Thus a rule which makes it the duty of a teacher to keep a record of the standing of each pupil in the studies pursued by him, of his attendance and deportment, to send each month by such pupil a written report of such standing to his parent or guardian, and which requires the latter to sign and return such report to the teacher, is reasonable and binding, and, upon the refusal of the parent or guardian to sign and return such report, the pupil may be excluded from the school: *Bourne v. State*, 35 Neb. 1. The governing body of a public school may exclude therefrom a child whom they deem to be of a licentious and immoral character, although such character is not manifested by any acts of licentiousness or immorality within the school: *Sherman v. Inhabitants of Charlestown*, 8 Cush. 160. Or they may exclude a child "because he is too weakminded to derive any marked benefit from instruction," and because "he is also found unable to take the ordinary decent physical care of himself": *Watson v. Cambridge*, 157 Mass. 561. Thus a child may, in good faith, be excluded from school for "general persistence in disobeying the rules of the school to the injury of the school": *Hodgkins v. Rockport*, 105 Mass. 475. The principal of a public school may refuse a child admission if he has not sufficient education to enter the lowest grade of such school: *Ward v. Flood*, 48 Cal. 36; 17 Am. Rep. 405. But where a child passes a satisfactory examination in all the studies taught in a high school, except that of grammar, which his father does not desire him to study, and he is refused admission to the school because of his deficiency in grammar, his exclusion is illegal, as he has a right to admission to the school to pursue such studies as he has shown proficiency in and as his father desires him to study, and any rule or regulation which excludes because of such deficiency in grammar is unreasonable and void: *Trustees of Schools v. People*, 87 Ill. 303; 29 Am. Rep. 55. A boy may be excluded from the schoolroom for the use, in the presence of the other scholars, of profane and insulting language to one of the trustees of the school, who was at the schoolhouse just before the opening of the school for the day: *Beck v. Smith*, 41 Conn. 442.

BARNES v. BLUTHENTHAL.

[101 GEORGIA, 508.]

EXECUTION SALES—DEFICIENCY ON RESALE—RIGHT OF SHERIFF TO RECOVER.—If a sheriff legally sells personalty under execution, and, upon the refusal of the purchaser to comply with the terms of sale, the property is resold at his risk and brings a lower price, the sheriff may recover from him, in addition to the deficiency, any absolutely necessary and proper expense attendant upon the keeping and storing of the property pending its readvertisement and sale.

Mayson & Hill, for the plaintiff.

Glenn, Slaton & Phillips, for the defendants.

⁵⁸⁹ FISH, J. Barnes, sheriff of Fulton county, brought his action against Bluthenthal & Bickart, in the city court of Atlanta, alleging, that on February 4, 1894, he, as such sheriff, duly exposed for sale, under order of the superior court of Fulton county, in the case of Mrs. E. A. Rose v. Rose & Son, the stock of liquors belonging to Rose & Son; that defendants became the purchasers at twelve hundred and fifty dollars, being the highest and best bidders; that they refused to comply with their bid and pay the same, whereupon another order was procured in the same case from said superior court, under which last order the liquors were exposed to sale by plaintiff on February 18, 1895, at the same place, and defendants again bid on them, but at the second sale they brought only twelve hundred and one dollars; that defendants were notified, when they refused to comply with their bid at the first sale, that the liquors would be resold at their risk; that the storage for the liquors, pending the readvertisement and sale, was sixty-two dollars and fifty cents, which amount and the forty-nine dollars difference between the bids by the defendants at the first and second sales they had refused to pay. An amendment was allowed, so that the suit should proceed in the name of Barnes, sheriff, for the use of Mrs. E. A. Rose. When the case was called for trial, the defendants demurred orally to the declaration, and moved to dismiss the same, on the grounds: 1. That the plaintiff could not recover the amount sued for, in his capacity as sheriff; and 2. That the item for loss by storage charges, pending resale, could not be recovered by the sheriff, and as that fact appeared by the declaration, the court was without jurisdiction and the case should be dismissed. The demurrer was sustained and the case dismissed, whereupon the plaintiff excepted.

1. The controlling question in this case is, whether the storage for the stock of liquors, levied on by the sheriff, from the date of the first sale to the time of the second sale, can be recovered from defendants. In *Robertson v. Smith*, 37 Ga. 604, expenses of this kind are fully recognized as just and legal, and are ⁶⁰⁰ considered as costs, for which, in that case, the court entered up judgment in favor of the sheriff against the plaintiff, who had dismissed his case. In *Alexander v. Herring*, 54 Ga. 200, it was held that: "The measure of damages in a suit by an administrator, against a purchaser at his sale, for a deficiency in the amount of a second sale, is what must be added to the amount of the second sale, to put the administrator in the same position as if the defendant had fully complied with his bid." In that

case, the administrator was allowed to recover from the purchaser at the first sale, who failed to comply with his bid, taxes which accrued between the two sales, on the land sold, and which had been paid by the administrator. The court said: "It is the plain intent of the statute to protect the beneficiaries of the sale to the full amount of the bid, to provide no harm shall come to them from this repudiation of the contract by the bidder." The seller should be made as whole as if the bidder had complied with his bid. If it be necessary for its proper care and preservation that property levied upon by a sheriff should be stored until it can be duly sold, then the expense of such storage must fall upon some one. Ordinarily, it would fall upon the defendant, as the plaintiff has the right to have his judgment fully satisfied out of the defendant's property. Where, however, the defendant permits his property to go to sale, and the purchaser thereof fails and refuses to comply with his bid, and thus causes delay and necessary expense, it is but strict right and justice that such expense should fall upon the recalcitrant bidder. Under such circumstances, any absolutely necessary and proper expense attendant upon the keeping and storage of the property, pending the readvertisement and sale of the same, may be treated as increasing the deficiency for which the original purchaser is liable. This rule, however, should be restricted to absolutely necessary and unavoidable expenses, and to such as where to hold otherwise would be a hardship upon the officer. Section 5466 of the Civil Code provides that it shall be at the option of the sheriff to proceed against the recusant purchaser for the full amount of the purchase money, or to resell the property and then proceed against the first purchaser for the deficiency ⁶⁰¹ arising from the sale. Section 5467 says: "The action may be brought in the name of the sheriff making the sale, for the use of the plaintiff or defendant in execution, or any other person in interest, as the case may be." The sheriff is the real party plaintiff. The contract sued on was made with him, and it was optional with him whether he would sue for the full amount of the purchase money, or resell and sue for the deficiency arising from the last sale. The use is made a party simply to show, in the language of the statute, the "person in interest." The suit as amended, therefore, was properly brought: Glenn v. Black, 31 Ga. 393; Sharman v. Walker, 68 Ga. 148. The act of December 11, 1894 (Acts 1894, p. 209), provides that "the city court of Atlanta shall not have jurisdiction of any suit or cause of action where the principal sum

claimed, exclusive of interest, does not exceed one hundred dollars, in cases where the jurisdiction is now vested in the justice courts." As the plaintiff, upon proper proof, was entitled to recover the forty-nine dollars, the difference between the bid at which defendants purchased at the first sale and the price at which the property was resold, and, in addition to that, the necessary expense of storage, alleged to be sixty-two dollars and fifty cents, thus making the principal sum claimed, exclusive of interest, more than one hundred dollars, the above cited act does not apply, and the city court had jurisdiction.

2. The court erred in sustaining the demurrer to the plaintiff's declaration.

Judgment reversed.

All the justices concurring.

EXECUTION SALES—RESALE—LIABILITY OF FIRST PURCHASER.—The purchaser at a sheriff's sale must pay his bid at once, or it may be disregarded and the property resold: *Durnford v. Degruys*, 8 Mart. 220; 13 Am. Dec. 285; *Hardesty v. Wilson*, 2 Gill, 481; 41 Am. Dec. 439. The resale must be made upon the same conditions as the first as near as may be, in order to render the first purchaser liable for the difference between the sales: *Shinn v. Roberts*, 1 Spenc. 435; 43 Am. Dec. 636. The purchaser is liable for the constable's costs and charges in addition to the purchase price offered at the prior sale, if the proceeds of the resale are not sufficient to cover the entire amount: *Coffman v. Hampton*, 2 Watts & S. 377; 37 Am. Dec. 511. See *Farmer's etc. Bank v. Martin*, 7 Md. 342; 61 Am. Dec. 350. But where the resale is by agreement of the parties, and the original sale has not been reported to or confirmed by the court, and the first purchaser purchases at the resale, he is not liable for the difference between the amounts realized at the first and second sales: *Stout v. Philippi Mfg. etc. Co.*, 41 W. Va. 839; 56 Am. St. Rep. 843.

ROBERTS v. HARRISON.

[101 GEORGIA, 773.]

NUISANCE—NATURAL ACCUMULATION OF WATER.—If a pond of water accumulates upon land, from natural causes, in such quantities that, in process of evaporation, noxious and deleterious gases are emitted, injurious to the public health and to the health of persons residing in the vicinity, the owner cannot be held answerable for creating or maintaining a nuisance, nor compelled to abate the pond as such, when he has not, by his own act or negligence, contributed to bring about the alleged nuisance.

E. C. Armistead, for the plaintiffs.

H. H. Dean, for the defendant.

774 SIMMONS, C. J. A petition was filed by Roberts and five others, under section 4760 of the Civil Code, for the removal

of a pond of water which had collected upon the lands of W. O. Harrison. The jury returned a verdict finding the pond a nuisance, and the justices of the peace directed the sheriff or his deputy to enter upon the lands "and abate the nuisance complained of, by removing said pond in the most feasible manner." The defendant carried the case by certiorari to the superior court. There the certiorari was sustained and the judgment of the justices set aside, on the ground that while, in a sense, the pond complained of is a nuisance, it is not such a legal nuisance as the justices of the peace have jurisdiction to abate.

The area of the pond in question varied from time to time, and the water, partially receding, would leave exposed to the sun portions of land which had been submerged. In the processes of evaporation and by the decay of large masses of vegetable matter, noxious and deleterious gases were emitted which were injurious to the public health and to the health of persons residing in the community. The accumulation of the water was due solely to natural causes, and the defendant did not, by his own act or negligence, contribute to bring about the alleged nuisance. At one time, the land had been drained by a ditch which emptied into a creek, but in consequence of the filling in and choking up of either the ditch or the creek, or both, the water accumulated and formed the pond. The defendant had done nothing to interfere with the natural drainage, and the pond was formed by the overflow of the creek due entirely to causes over which the defendant had no control.

The presence of the pond and the attendant evils were doubtless annoying and even injurious to persons residing in the neighborhood, but we think that they do not constitute a ⁷⁷⁵ nuisance for which the defendant can be held answerable, or which he can be compelled, under section 4760 of the Civil Code, to abate. This court has held that a person is not guilty of an actionable nuisance unless the injurious consequences complained of are the natural and proximate results of his own acts or failure of duty: *Brimberry v. Savannah etc. Ry. Co.*, 78 Ga. 641, and the cases there cited and discussed. This doctrine we think is the true one, and it is recognized as such by all the authorities on this point which we have examined. In 1 Wood on Nuisances, section 116, we find the rule thus stated: "Where water collects in low, marshy places, and, by reason of becoming stagnant, emits gases that are destructive to the health, and lives even, of the community, this is not a nuisance in the legal sense; and the owner of the land is not bound to drain it, nor

can he be subjected to action or indictment therefor. The reason is, that in order to create a legal nuisance, the act of man must have contributed to its existence. Ill-results, however extensive or serious, that flow from natural causes, cannot become a nuisance, even though the person upon whose premises the cause exists could remove it with little trouble and expense. . . . Thus it will be seen that a nuisance cannot arise from the neglect of one to remove that which exists or arises from purely natural causes": See, also, *Gates v. Aratkir*, 24 Q. B. Div. 656; *Mohr v. Gault*, 10 Wis. 513; 78 Am. Dec. 687; *Hartwell v. Armstrong*, 19 Barb. 166; *State v. Rankin*, 3 S. C. 438; 16 Am. Rep. 737; *Peck v. Herrington*, 109 Ill. 611; 50 Am. Rep. 627; *Woodruff v. Fisher*, 17 Barb. 224.

The facts of the present case place it within the principles announced in the cases above cited, and the judgment of the justices of the peace was erroneous. The certiorari of the defendant was properly sustained and the judgment of the justices set aside.

Judgment affirmed.

All the justices concurring.

NUISANCE—STAGNANT WATER.—A nuisance is anything that worketh hurt, inconvenience, or damage to another: *Coker v. Birge*, 9 Ga. 425; 54 Am. Dec. 347. Obstruction of a running stream occasioned by the washing down of its banks does not in law constitute a nuisance, unless such obstruction is attributable to the acts or agency of man: *Mohr v. Gault*, 10 Wis. 513; 78 Am. Dec. 687, and note. One is not guilty of a public nuisance unless the injurious consequences complained of are the natural, direct, and proximate cause of his own acts: *State v. Rankin*, 3 S. C. 438; 16 Am. Rep. 737. If a mill pond, which has existed for seventy years, becomes a public nuisance, by corrupting the air, causing disagreeable smells and sickness, the owner may be indicted: *State v. Rankin*, 3 S. C. 438; 16 Am. Rep. 737.

KEARNEY v. STATE.

[101 GEORGIA, 803.]

EVIDENCE—DYING DECLARATIONS.—The declaration of a person after he was shot that, in his opinion, the shooting was accidental, is not admissible in evidence as a dying declaration in favor of the party accused of his murder by such shooting.

WITNESSES—RIGHT OF COURT TO CAUTION.—It is proper for the trial judge, when he observes that a witness is embarrassed or hesitates while testifying, to caution him not to become excited and to think over what he is about to say.

TRIAL—IMPROPER CONDUCT OF COUNSEL—WAIVER. If on a criminal trial the prosecuting attorney makes an improper statement unknown to the trial judge, or indulges in improper argument promptly stopped by such judge of his own motion, and no

ruling on such conduct is requested on the part of the accused at any time, it is too late after verdict to urge such conduct as ground for a new trial.

TRIAL—DISCRETION OF COURT.—On a trial for murder, the court may properly inquire whether the pistol with which the homicide is alleged to have been committed has been formally offered in evidence or not, in order to satisfy his own mind on that point.

EVIDENCE—PROOF OF CONTENTS OF WRITING BY PAROL.—If the fact that a witness has knowledge of the existence of an insurance policy is relevant as affecting her credibility, it may be inquired into, and she may be allowed to state the amount of such policy if she knows it, as a substantive fact independent of the policy.

TRIAL—PRESENCE OF OFFICIAL REPORTER.—The trial court need not require the official reporter to remain in attendance until the termination of the trial in order that, in case of disputes between counsel as to what the evidence is, a party may not be "deprived of the privilege of referring to the official report of the case to refresh the recollection of the jury."

CRIMINAL LAW—INSTRUCTIONS.—If, on a murder trial, the court undertakes to instruct the jury as to the various forms in which their verdict may be written, and in so doing states what would be proper forms for all findings, from that of murder without recommendation down to involuntary manslaughter in the commission of a lawful act, he should not fail to state what the form of verdict should be in case of acquittal, but failure to do so is not ground for a new trial, when it appears that the court distinctly charged the jury that, in a certain view of the evidence, they should acquit the accused, and when it is manifest, from finding him guilty of the highest offense charged, that the omission in question could have done him no injury.

T. S. Morgan, Jr., and T. L. Hill, for the plaintiff in error.

J. M. Terrell, attorney general, and W. W. Osborne, solicitor general, for the state.

804 FISH, J. Patrick Kearney was indicted for the murder of John W. Wyness. He was convicted, and upon his motion for a new trial being overruled, he excepted.

1. The court properly refused to permit the witness Hallinan to testify, in behalf of the accused, that Wyness, the deceased, the day after the shooting, told the witness that the shooting was accidental, and requested the witness to so inform the recorder, at the time saying that it must have been accidental, because he did not think Pat would have done it on purpose. These statements were matters of opinion or belief, and therefore were not admissible as dying declarations: *McPherson v. State*, 22 Ga. 478; *Whitley v. State*, 38 Ga. 50; *Ratteree v. State*, 53 Ga. 570; 6 Am. & Eng. Ency. of Law, 126, and cases there cited.

2. It was not improper for the judge, when he saw that the

witness John Coaker was embarrassed or hesitated while testifying, to caution him by saying, "Don't get excited; just think it over." What the judge did was evidently for the purpose of eliciting the truth from the witness, and was in the interest of a fair and impartial trial, and the accused had no just cause of complaint. In *Epps v. State*, 19 Ga. 118, Judge Lumpkin said: "Counsel, in their zeal to acquit their clients, seem to take it for granted that the only object of courts is to convict. Until called upon to discharge the solemn and responsible functions of a judge, they never can fully appreciate the high sense of obligation under which they act to God and their fellow-citizens. . . . His [the judge's] aim being neither to punish the innocent nor screen the guilty, but to administer the law correctly."

3. The solicitor general asked the witness Coaker, "Did any of Mr. Kearney's friends ever offer you any money to testify in this case?" The question being objected to by counsel for the accused, the solicitor remarked, "I will withdraw the witness now, as I stand prepared to prove it." Plaintiff in error, in his motion for new trial, alleges that such statement was ⁸⁰⁵calculated to prejudice and harm him before the jury. The judge certifies that he did not hear the remark of the solicitor general, that his attention was not called to it, and that no objection was made to it at the time by counsel for the accused. It is due to the solicitor general to say that he contended that the remark was only intended for the ears of counsel for the accused, who was sitting near by. The statement was certainly improper, but as the judge did not hear it, and as his attention was not called to it, either when made or afterward during the trial, and as no ruling was invoked upon it at any time, it was too late after verdict to raise the point in the motion for a new trial. In *Young v. State*, 65 Ga. 528, it was held: "For counsel to sit silently by, saying nothing, asking no correction in the charge, and never bringing his complaint to the attention of the judge, until it appears among the grounds for a new trial, would be to lie in ambush both for him and the opposite party; and this the law does not encourage."

When the solicitor general, in his concluding argument to the jury, made the improper remarks complained of, counsel for the accused made no objection nor asked any ruling in reference to them. The judge certifies that he, of his own motion, immediately checked and rebuked the solicitor, directing him to confine his argument to the evidence, and at the same time instructed the jury that they, also, must confine them-

selves to the evidence in the case and the law as given them in charge. The misconduct of the solicitor general, under such circumstances, is not cause for a new trial. Advantage should have been taken of the irregularity before verdict. As to the proper procedure when counsel is guilty of improper conduct in the trial of a case, and as to the judge's rebuke to counsel, and his charge to the jury curing such misconduct, see *Castleberry v. Atlanta*, 74 Ga. 164; *Towner v. Thompson*, 82 Ga. 740; *Ozburn v. State*, 87 Ga. 182 (5); *Metropolitan Street R. R. Co. v. Johnson*, 90 Ga. 501; *Edwards v. State*, 90 Ga. 143; *Farmer v. State*, 91 Ga. 728; *Von Pollnitz v. State*, 92 Ga. 16; 44 Am. St. Rep. 72; *Augusta Ry. Co. v. Glover*, 92 Ga. 133; *Robinson v. Stevens*, 93 Ga. 535; *Richmond etc. R. R. v. Mitchell*, 95 Ga. 79; *Ficken v. State*, 97 Ga. 813.

⁸⁰⁶ 4. The judge certifies that his inquiry in reference to whether the pistol had been offered in evidence or not was made to satisfy his own mind whether the pistol had been formally offered in evidence. We think there was no impropriety in his so doing. Even had he suggested to the solicitor general to put the pistol in evidence, without more, we are not prepared to say it would have been error. In a case where the accused was charged with forging a certain order, and the solicitor had announced the state's case closed, and the judge suggested to the solicitor, "if he had not better offer the order in testimony," to which proceeding the accused excepted: 1. For irregularity and interference by the court; and 2. Because the state had closed, and it was too late to offer other evidence, the judgment below was affirmed, and Judge Lumpkin, delivering the opinion, said: "As to the right of the court to interfere in the management of a cause, civil or criminal, in reforming the pleadings and directing the necessary proofs to be adduced—in short, in assuming the general superintendence and control of the litigation before it—it is a point of extreme delicacy with which we are reluctant to interfere. We are not inclined to deny the power in toto; still less to encourage its exercise. We see nothing in the present case to demand imperatively the corrective interposition of this court": *Hoskins v. State*, 11 Ga. 97 (4). In *Moore v. Cameron*, 12 Ga. 266, which was complaint for rent, in the progress of the case, "the court remarked to counsel for plaintiff that, to enable him to recover, he must prove the premises were rented from the plaintiff, which said attorney did by his own oath." To which suggestion of the court defendant excepted, and on his exception assigned error. Judge Nisbet,

delivering the opinion, said: "The suggestion of the presiding judge to the plaintiff's counsel, that it would be necessary for him to prove that the defendant rented the property from the plaintiff, was perfectly correct. It was not only the right, but it was the duty, of the court to make that or any other suggestion which he saw was necessary to the rights of either party." So in *Goodrum v. State*, 60 Ga. 509 (3), this court held: "Where, in the progress of a criminal trial, the court observes ⁸⁰⁷ that a rule of public policy has been or is being violated in practice, the judge may, of his own motion, call attention to it, and have the proper correction applied." On the same line are the many cases holding that it is not only the right but the duty of the trial judge to interrogate witnesses whenever he desires to ascertain a fact with a view to the correct administration of the law. Again, quoting from Judge Lumpkin, in *Epps v. State*, 19 Ga. 118: "We know of no limit to the right which belongs to the court of interrogating witnesses, either in civil or criminal cases, particularly the latter. The life or death of a man may hang upon the full development of the truth. The presumption that this liberty will not be honorably and impartially exercised is not to be tolerated for a moment." In *McGinnis v. State*, 31 Ga. 261 (2), it was held that there was no error in the court compelling the solicitor general to ask a witness a question. Unless the trial judge should manifestly abuse the discretion which is necessarily reposed in him in such matters, this court will not feel called upon to interfere.

5. Plaintiff in error asked that a new trial be granted because the court erred in permitting the state, over the objection of defendant's counsel, to bring out, under cross-examination, that Wyness, the deceased, had an accident insurance policy upon his life for the sum of five thousand dollars; the objections being, first, that it was irrelevant, and next, that the policy itself was the best evidence. The theory of the defense was, that Wyness was accidentally killed by the accused. Mrs. Wyness, the widow of the deceased, had testified in behalf of the accused, and, upon cross-examination by the solicitor, she stated that the deceased had an accident insurance policy upon his life. This statement was objected to by counsel for the accused, on the ground of irrelevancy. She then stated that the policy was for five thousand dollars. This last statement was objected to, on the ground that the policy was the best evidence. The judge certifies that he ruled that the witness could state the amount of the policy, if she knew it as a substantive fact independent of

the policy. If Wyness had such an accident insurance policy on his life, it might be ⁸⁰⁸ to the financial interest of his widow that it be proved that he was accidentally killed, and her knowledge of the existence of such a policy was relevant as affecting her credibility as a witness. Her information on the subject was material; its source immaterial. "The rule excluding secondary evidence does not apply to matter not relevant to the merits, but drawn out on cross-examination to test the temper and credibility of the witness": Abbott's Trial Brief, Criminal Causes, sec. 436, citing *Klein v. Russell*, 19 Wall. 439, 464; *Kalk v. Fielding*, 50 Wis. 339.

6, 7, 8. The sixth, seventh and eighth headnotes sufficiently elaborate the conclusions stated therein.

Judgment affirmed.

All the justices concurring.

HOMICIDE—DYING DECLARATIONS—ADMISSIBILITY AS EVIDENCE.—Dying declarations are admissible in evidence only when the death of the declarant is the subject of the charge, and the circumstances of the death are the subject of the declarations: *State v. Harper*, 35 Ohio St. 78; 35 Am. Rep. 596. See extended notes to *Field v. State*, 34 Am. Rep. 479-482; and *Cox v. State*, 37 Am. Rep. 83-89. A dying declaration that the defendant had no reason that the declarant knew of for perpetrating the crime, is admissible: *Boyle v. State*, 105 Ind. 469; 55 Am. Rep. 218; but dying declarations not part of the *res gestae* are not competent in exculpation of the accused: *Moeck v. People*, 100 Ill. 242; 39 Am. Rep. 38, and note.

TRIAL—IMPROPER STATEMENTS BY COUNSEL.—Comments of counsel in arguing a case before a jury are controllable in the discretion of the trial court. This discretion is subject to review, and when counsel makes material statements, outside the evidence, likely to do the accused an injury, it is deemed an abuse of discretion when not stopped by the court on objection made at the time: *Jenkins v. State*, 35 Fla. 737; 48 Am. St. Rep. 267. But to be reviewable on appeal, though such comments are excepted to when made, the court must have been requested to take some action, and have erred in refusing or granting the request. *Lunsford v. Dietrich*, 93 Ala. 565; 30 Am. St. Rep. 79; *Murray v. Doud*, 167 Ill. 368; 59 Am. St. Rep. 297, and note.

HOMICIDE—INSTRUCTIONS AS TO DEGREE OF CRIME—Where a conviction for manslaughter in the fourth degree might have been warranted by the evidence in a cause, it is erroneous for the court to omit entirely any mention, in its charge to the jury, of the fourth degree of manslaughter, after instructing them that under the indictment they might convict the defendant of either murder in the first or second degree, or of manslaughter in the second or third degree, especially if it omits to intimate to the jury that it had the power to acquit the prisoner if the evidence warranted an acquittal: *Pinder v. State*, 27 Fla. 370; 26 Am. St. Rep. 75.

CASES
IN THE
SUPREME COURT
OF
INDIANA.

BOOKOUT v. BOOKOUT.

[150 INDIANA, 63.]

MARRIED WOMAN—CONVEYANCE ON THE EVE OF MARRIAGE TO DEFEAT RIGHTS OF.—A secret voluntary conveyance, made by a man on the eve of his marriage, operates as a fraud upon his wife, and will not be permitted to defeat her of her dower or other interest in the lands conveyed thereby, where he has represented to her that he is the owner of such lands as an inducement to the marriage.

J. M. Brown and S. H. Brown, for the appellant.

M. E. Forkner, for the appellee.

64 JORDAN, J. This was a suit in the lower court by appellee to set aside certain conveyances of real estate made by her late husband, Robert Bookout, to appellant and others prior to their marriage, on the grounds that said conveyances were executed for the fraudulent purpose of defeating her inchoate interest in the lands conveyed. She was successful in her action in respect to twenty-five acres of the land conveyed to appellant, in which the court found she was entitled to her interest as widow of her deceased husband, and she was awarded partition for the same. But two questions are sought to be presented by appellant: 1. The sufficiency of the complaint on demurrer; 2. The sufficiency of the evidence to sustain the judgment.

The complaint avers, in substance, that the plaintiff, Mrs. Bookout, is the lawful widow of Robert Bookout, deceased, and that he and the plaintiff were married to each other, and became husband and wife in August, 1891, and that she remained his said wife until the date of his death, which occurred in October, 1895. That at the time of said marriage her husband, Robert Bookout, was in actual possession of the lands described in the

complaint, and was occupying the same as his homestead. . And it is averred that he was in fact the owner of said real estate and in visible and open possession thereof at the time of their marriage under a clear and indefeasible title of record; that to induce the plaintiff to marry him he represented to her that he was the owner of all the lands in question, and promised, in consideration that she would marry him, that if she survived him as his widow, she would have and receive her rights as such in and to said lands. It is alleged that the public ⁶⁵ records disclosed that the said Robert Bookout was the absolute owner of said realty, and that the plaintiff relied on said representations and the showing of title as exhibited by said records, and in good faith, and without any notice of the fraudulent conveyances mentioned in the complaint, consented to and did marry the said Robert Bookout, as above stated; that she was induced to marry him by reason of said representations of ownership of said lands, and without the same having been made she would not have entered into said marriage relation. The complaint further alleges that a short time prior to the said marriage, and in anticipation thereof, and for the purpose of cheating and defrauding her in her marital rights, said Robert Bookout executed two deeds purporting to convey the lands in controversy to the defendants, who are his children and grandchildren by a former marriage, the plaintiff being a childless second wife. It is further averred that these deeds were executed wholly without any consideration, and for the fraudulent purpose, as heretofore stated, all of which the defendants had full knowledge at the time of the execution thereof; that in furtherance of said fraudulent purpose, and in order to conceal the fact of their execution from the plaintiff, the defendants withheld said deeds from the public records for more than forty-five days from the time of their execution, and, in fact, until within a few months of the death of the said Robert Bookout; that the latter at his death possessed no other lands than these in dispute, and owned at said time only a small amount of personal property, not exceeding five hundred dollars in value. The prayer is that the conveyances mentioned be set aside as fraudulent and void as to plaintiff, and that she be adjudged the owner, during her life, of the undivided ⁶⁶ one-third of said real estate, and that she have partition of her said interest, and that the remainder of the realty be declared subject to a lien for the five hundred dollars allowed her under the law.

Marriage, in the eye of the law, is held to be a valuable con-

sideration, and the wife is regarded as a purchaser for a valuable consideration of all property which accrues to her by virtue of her marital rights, or by virtue of any valid antenuptial contract: *Derry v. Derry*, 74 Ind. 560. Not only is marriage a valuable consideration, but it is the highest consideration recognized by law: *Richardson v. Schultz*, 98 Ind. 429, 435. Persons about to marry occupy a position of confidential relations to each other requiring the greatest good faith: 14 Am. & Eng. Ency. of Law, 546. Consequently, the doctrine affirmed and supported by the authorities is that a secret voluntary conveyance by a man of his lands on the eve of his marriage operates as a fraud upon his wife, and cannot serve to defeat her upon his death of her dower or interest in such lands allowed to her under the law as his widow. Therefore, she may successfully assert her rights thereto as though such conveyance had not been made. The facts set up in the complaint bring the case fully within the rule affirmed by the decisions of this court, which, in effect, are that, where a man and a woman are about to enter into marriage relations with each other, and one represents to the other that he or she, as the case may be, is the owner of certain property, as an inducement to such marriage, and such representations enter into and operate as a part of the consideration or inducement to the consummation of the marriage, then a secret voluntary conveyance of the property made on the eve of the marriage would be fraudulent, and could not defeat the rights under the law of the surviving husband or ^{or} widow, as the case might be: *Dearmond v. Dearmond*, 10 Ind. 191; *Alkire v. Alkire*, 134 Ind. 350.

Appellant insists that the second paragraph of the complaint is bad, for the reason that it does not aver that the husband owned the lands at the time of the marriage, or that he died seised thereof, as owner. In this contention, however, counsel for appellant are mistaken. The second paragraph of the complaint, while somewhat more specific in its averments, is substantially the same as the first, from which we have summarized the material facts heretofore mentioned and set out, and it expressly alleges that the husband was in fact seised of the lands in controversy at the time of his marriage, and also at the date of his death. Or, in other words, the paragraph proceeds upon the theory that the husband in fact was seised of the lands in dispute at the date of his marriage, and also at his death, for the use of the plaintiff, or, at least, so far as her interest therein was concerned, notwithstanding the fraudulent

conveyances. The complaint is sufficient, and the court did not err in overruling the demurrer thereto. Without passing upon the question of whether the motion for a new trial was seasonably filed, we have considered the evidence in the case, and are of the opinion that it is sufficient to sustain the judgment.

The judgment is therefore affirmed.

FRAUDULENT CONVEYANCES ON EVE OF MARRIAGE.—Conveyances of real estate made by a man who is about to marry, without the knowledge of his intended wife, and with the object, and for the purpose, of defeating the interest which she would acquire in his estate by the marriage, are, as to her, fraudulent and void: See monographic note to *Thayer v. Thayer*, 39 Am. Dec. 218; *Cranson v. Cranson*, 4 Mich. 230; 66 Am. Dec. 534, and note; *Swaine v. Perine*, 5 Johns. Ch. 482; 9 Am. Dec. 318. So, a voluntary conveyance of property on the eve of marriage, without the knowledge of the intended husband, will be set aside as a fraud on the marital rights: *Manes v. Durant*, 2 Rich. Eq. 404; 46 Am. Dec. 65, and note. See note to *Lamb v. Lamb*, 30 Am. St. Rep. 230.

ROACH v. CLARK.

[150 INDIANA, 98.]

APPELLATE PROCEDURE—WHEN NOT CONTROLLED BY THE PROBATE PROCEDURE ACT.—Where the remedy sought by or against an estate is not provided by the probate procedure act, but must be enforced under the Civil Code, an appeal is governed by such code. Therefore, where the proceeding is to obtain a writ of assistance to place a purchaser in possession, the appeal may be taken within the time allowed by the Civil Code.

THE ISSUING OF A WRIT OF ASSISTANCE is within the discretion of the court, but can be justified only when the right is clear, and there is no equity or appearance of equity in the defendant, and when the sale and proceedings under the decree are beyond suspicion.

A WRIT OF ASSISTANCE WILL NOT BE ISSUED where there is a bona fide contest as to the right to the possession of land under a sale, or where the rights of the parties have not been adjudicated in the principal suit.

Thomas D. Evans, for the appellant.

L. H. Stanford, G. W. Pigman, Reuben Conner, and J. M. McIntosh, for the appellees.

HACKNEY, J. The appellee instituted this proceeding, by petition, for a writ of assistance to place him in possession of an eighty acre tract of land alleged to have been purchased by him at a sale by an administrator upon an order of the court below. Thomas W. Roach, responding to the petition, alleged that the decedent, who died the owner in fee simple of said real estate, left him surviving as her widower; that she left

no debts contracted before her marriage to him; that he became and continued the owner in fee of one-third of said lands undivided and as tenant in common with other heirs of the decedent; that the appellee's claim of title rested upon proceedings by said administrator to sell said lands to pay debts of the estate of said decedent; that to said proceeding he was a party, but the only allegation as to him in the petition to sell was that he was an heir of the decedent; that he was duly summoned, and made default, and that no issue was made or tried as to him excepting that which arose upon the allegation that he was an heir; that Clark acquired and owns two-thirds of the land, undivided, and that he, appellant, owns the remaining third, Clark claiming to own the whole. The prayer was for a denial of the writ, for the quieting of his title to a one-third interest in fee in said lands, and for partition. To this pleading the appellee filed what he termed a reply, in which he set forth that, in the year 1893, Francis E. Baker had owned said lands, and had sold and conveyed ⁹⁵ them to the decedent, no part of the consideration for the conveyance having been paid, but that she had executed her notes for five thousand three hundred and fifty dollars, and had secured them by a mortgage on said lands, in which her husband, said appellant, had joined; that Baker had filed his claim against said estate, and which had been allowed by the administrator, with the knowledge of said appellant; that the appellant had sought a loan to pay said mortgage. It is alleged, further, that said appellant knew that the petition sought to sell the entire tract; that the order of the court was to sell the entire tract free from liens; that the notice was so to sell; that the appellee believed that he was purchasing the whole; that the deed described the whole, and that the court approved the sale of the whole, he, said appellant, having been present at each of said steps in the sale with such knowledge, and asserting no claim to any interest in said lands; that the appellee would not have bid the sum paid by him, to wit, five thousand dollars, for the two-thirds of said land, and would not have bid upon the whole, nor paid the purchase money and received the conveyance, if appellant had at any of said steps asserted a claim to any part of said lands. The purchase money, notes and mortgage of the decedent are exhibited, the petition to sell is made part of the pleading by reference, and the order of sale and deed are filed also as exhibits. A demurrer to this reply was overruled, and exception reserved, and that ruling is assigned as error. A trial

resulted in a special finding by the court, with conclusions of law, holding: 1. Appellee estopped to assert title through the lien of the mortgage; 2. Appellant estopped to assert title or right by reason of his acts; 3. Appellee entitled to the writ of assistance. The appellant, Roach, assigns as error also the second and third conclusions stated, and the appellee ^{vs} assigns by way of cross-error said first conclusion of law.

The appellee moves to dismiss the appeal for the reason that it was not perfected within forty days from the rendition of judgment. This motion is made upon the theory that the proceeding was connected with the settlement of an estate, in that it was to make effective the sale by the lower court in the exercise of its probate jurisdiction, and that since appeals in matters connected with a decedent's estate must be taken within forty days, as provided by statute, sections 2609 and 2610 of Burns' Revised Statutes of 1894, therefore the appeal must be dismissed.

Where the remedy sought by or against an estate is not provided by the probate procedure act, but must be enforced under the Civil Code, the appeal is not under sections 2609 and 2610, *supra*, but is under the Civil Code: *Simmons v. Beazel*, 125 Ind. 362; *Walker v. Steele*, 121 Ind. 436; *Koons v. Mellett*, 121 Ind. 585; *Wright v. Manns*, 111 Ind. 422; *May v. Hoover*, 112 Ind. 455; *Heller v. Clark*, 103 Ind. 591; *Claypool v. Gish*, 108 Ind. 428; *Dillman v. Dillman*, 90 Ind. 585; *Yearley v. Sharp*, 96 Ind. 469; *Hillenberg v. Bennett*, 88 Ind. 540; *Merritt v. Straw*, 6 Ind. App. 360; *Louisville etc. Ry. Co. v. Etzler*, 4 Ind. App. 31; *Galentine v. Wood*, 137 Ind. 532; *Harrison Nat. Bank v. Culbertson*, 147 Ind. 611. The remedy here invoked is not provided by the probate procedure act, but is of a purely equitable character enforcible within the chancery jurisdiction of the courts: 2 *Ency. of Pl. & Pr.* 975; *Beach on Modern Equity Practice*, sec. 897; *Gibson's Suits in Chancery*, sec. 628; *Daniell's Chancery Practice*, 6th ed., secs. 1056, 1062, 1063, 1742; *Sharp v. Carter*, 3 P. Wms. 375; *Pelham v. Newcastle*, 3 Swanst. 289, note; *Payne v. Baxter*, 2 Tenn. Ch. 518; *Stanley v. Sullivan*, 71 Wis. 585; 5 *Am. St. Rep.* 245. As an ^{or} independent remedy, therefore, the practice must be deemed to exist under the general code, since the appeals therein provided obtain as to equitable as well as legal proceedings, where special provision is not made. That the settlement of a decedent's estate has remote connection with the remedy, as we have seen from the authorities cited, does not control. That remote connection was not such as to require that the estate should be made a party, and

the final settlement need not be delayed because of the appeal. The appeal, having been within the period prescribed by the Civil Code, was, we have no doubt, in time, and should not be dismissed.

The outline of the pleadings, as we have shown, discloses an application for the writ of assistance, a cross-action to quiet title, and an answer thereto alleging matters of estoppel in pais against the appellant to assert his claim of title. Upon the cross-complaint, the trial court held, by its first conclusion of law, that the appellee obtained no rights as a lienor under the mortgage, the notes having been filed and allowed as a claim against the estate only, and the purchase money paid by the appellee having, with that from another source, paid the mortgage debt. Upon the allegations of the answer to the cross-complaint the court held, by the second conclusion, that the appellant, by acts in pais, had estopped himself to assert the title claimed by him. By the third conclusion the court held that the writ should issue.

The sufficiency of the answer, called a reply, and the correctness of the second and third conclusions of law, are pressed upon us, and involve inquiries, as they seem to us, remote from the proper or possible scope of a proceeding for the writ of assistance. "It is commonly declared that the issuance of a writ of assistance⁹⁸ rests in the sound discretion of the court, and that it is used only when the right is clear, when there is no equity or appearance of equity in the defendant, and when the sale and proceedings under the decree are beyond suspicion; and it is certainly not customary to issue the writ where there is a bona fide contest as to the right to the possession of the land under the sale, or where the rights of the respective parties have not been fully adjudicated in the principal suit": 2 Ency. of Pl. & Pr. 980; *Van Meter v. Borden*, 25 N. J. Eq. 414; *Schenck v. Conover*, 13 N. J. Eq. 220; 78 Am. Dec. 95; *Hooper v. Yonge*, 69 Ala. 484; *Blauvelt v. Smith*, 22 N. J. Eq. 32; *Thomas v. De Baum*, 14 N. J. Eq. 37; *Wiley v. Carlisle*, 93 Ala. 238; *Barton v. Beatty*, 28 N. J. Eq. 412; *Knight v. Houghtalling*, 94 N. C. 411; *Frazier v. Beatty*, 25 N. J. Eq. 343; *Stanley v. Sullivan*, 71 Wis. 585; 5 Am. St. Rep. 245; *Ransdell v. Maxwell*, 32 Mich. 285; *Flowers v. Brown*, 21 Ill. 270; *Hayward v. Kinney*, 84 Mich. 591.

The holding of the lower court was not that the appellant was estopped by the proceeding to sell, as an estoppel by record or decree, nor by the allowance of Baker's claim against the estate, but by acts in pais. Upon this holding, the writ was or-

dered, not because the proceeding and sale in probate were beyond suspicion, or were fully adjudicated, nor because there was no appearance of equity in the appellant's claim of title, but it was ordered upon independent proceedings, in the nature of an action at law to quiet title, and upon the concession of title originally, but which had been lost by acts in pais. The application for the writ of assistance could never have been recognized to supply a remedy to quiet title concurrent with the statutory remedy. It was designed rather as a summary remedy for the enforcement ⁹⁹ of a right already determined by a court of equity, and which determination one of the parties refuses to recognize, and the other may enforce without resort to a new suit or action. But, where the rights of the parties have not been so determined as to render further litigation necessary, the application for the writ may not be the basis of such further litigation. The necessity appearing, upon application for the writ, the court will deny the writ, and the parties will be left to the forum having jurisdiction of the question unsettled.

The cross-demand and the answer thereto departed from the theory upon which the application for the writ could rest, and, when filed, the writ should have been denied. The error, therefore, in granting the writ, should be carried back to the application, and intermediate proceedings should be vacated and held for naught: *Equitable Accident Ins. Co. v. Stout*, 135 Ind. 444, 457. The judgment is reversed, with instructions to sustain the demurrers to the reply and answer, and to deny the writ.

WRIT OF ASSISTANCE—WHEN WILL ISSUE.—The exercise of power to grant a writ of assistance rests in the sound discretion of the court, and the power will never be exercised in a case of doubt, nor under color of its exercise will a question of legal title be tried or decided: *Schenck v. Conover*, 13 N. J. Eq. 220; 78 Am. Dec. 95, and note. The writ will issue to put an execution purchaser in possession only when the rights of the parties affected have been fully determined by judgment: *Stanley v. Sullivan*, 71 Wis. 585; 5 Am. St. Rep. 245, and note; *Exum v. Baker*, 115 N. C. 242; 44 Am. St. Rep. 449. See monographic note to *Wilson v. Polk*, 51 Am. Dec. 152-158, on writs of assistance. The writ will not issue when there is a contest as to the right of the execution purchaser to the possession of the land sold: *Stanley v. Sullivan*, 71 Wis. 585; 5 Am. St. Rep. 245.

MAGEE v. OVERSHINER.

[150 INDIANA, 127.]

STREETS—ADDITIONAL SERVITUDE IN.—The use of a public street for a telephone line is a servitude within the contemplated uses of such street. Hence it does not impose an additional burden for which an owner of abutting property is entitled to be compensated.

STREETS—NEW USES OF.—The dedication or appropriation of lands for a public street is not restricted to the purposes for which streets have hitherto been used, but the uses may be enlarged to answer all the additional and improved methods of attaining the same objects and enjoying the same privileges, not, however, to the substantial impairment of the owner's use and enjoyment of his abutting property.

A TELEPHONE SYSTEM MAY BE OWNED AND CONDUCTED by an individual as well as by a corporation or association.

G. W. Funk, D. H. Chase, and Blacklidge & Shirley, for the appellant.

S. T. McConnell, A. G. Jenkins, M. Bell, W. C. Purdum, E. B. Goodykoonts, and G. M. Ballard, for the appellee.

128 HACKNEY, J. Rufus Magee, the owner of a business property fronting upon one of the principal business streets of the city of Logansport and the owner of the fee in the street, brought this suit for a mandatory injunction to cause the removal of a telephone pole placed by the appellee, Overshiner, in the curb-line of the sidewalk in front of said property. The appellee, the owner of the telephone system in said city, placed said pole and strung wires upon the same in the night-time, after protest by the appellant, and without compensation to or consent from him.

The principal question in the case is as to whether such use of the street is a servitude not within the contemplated uses of a city street, and, therefore, an additional burden upon the fee of the appellant for which he should be compensated.

The decisions of the courts of this country, so far from establishing a definite rule upon this question, are at such variance as to render hopeless any effort to reconcile them.

At the threshold of our inquiries there are certain well-recognized propositions: The owner of the fee in a street which has been dedicated or condemned for a street is entitled to restrict its uses to such as are proper street uses, as stated by most of the decisions, to the uses contemplated at the dedication or condemnation; the public have only an easement for the proper uses of a street. When applied to new uses the fee-owner is en-

titled to compensation. When a use is by proper public authority, and is not an additional burden upon the fee, no compensation is due the fee owner. In the use of the public easement there is no right to unreasonably burden the fee to the special injury and damage of the fee-owner.

These general propositions, however, are of little service when we revert to the question: Is the telephone equipment an unnecessary or unreasonable obstruction and a new and additional servitude? Will it suffice to say that because a street was dedicated or condemned fifty years ago, before electric inventions for lighting, communicating oral and telegraphic messages, and propelling street-cars were thought of, it could not, therefore, have been condemned or dedicated in contemplation of the uses therein of such inventions; or that because gas had not been used as a method of lighting, the right to lay pipes to conduct the gas could not have been contemplated; or that because water, for protection against fire, had not been forced through pipes in the streets, such use could not have been contemplated, and so on as to the uses of the street for sewerage, for natural gas piping, for telegraph or telephone lines, above or below the surface of the street, or for the possible future uses of pneumatic tubes for the transmission of mail or parcels, and the distribution of steam or electricity for heating, et cetera? If what was actually contemplated at the time of the dedication should be found to answer the question in every case, many of the uses common to the streets of every city would be additional servitude for which the fee-owner would be entitled to compensation.

It must be, however, that the contemplated uses should be deemed to have been not only in the walking, riding upon horseback and in wagons or other vehicles drawn by animals, in the going and returning upon business, social, religious, or political missions,¹³⁰ but also by such methods of travel and communication, in addition or in substitution for those, as might come into vogue and be accepted and recognized as proper and important uses of the streets in the varying needs and demands of commerce, and the relations of man to man socially and otherwise. If this were not true, the way originally dedicated for a suburban highway, but by the growth of population becoming a city street, or the dedication of a village or town street afterward becoming the principal thoroughfare of a great city, would be limited to the uses in vogue at the time and suited to the country road or the village or town street, and the growth of population, the advancement of commerce, and the increase in

inventions for the aid of mankind would be required to adjust themselves to the conditions existing at the time of the dedication, and with reference to the uses then actually contemplated. That a dedication or condemnation is deemed to comprehend uses not actually in the minds of the parties at the time is seen from the almost unvarying rule that the electric street railway systems are not a new use and an additional servitude, but are a new method of enjoying an old and ever-existing use: *Eichels v. Evansville Street Ry. Co.*, 78 Ind. 261; 41 Am. Rep. 561; *Chicago etc. Ry. Co. v. Whiting etc. Ry. Co.*, 139 Ind. 297; 47 Am. St. Rep. 264; *Lockhart v. Craig Street Ry. Co.*, 139 Pa. St. 419; *Detroit City Ry. Co. v. Mills*, 85 Mich. 634. They carry the people by means of a propulsive force which is a substitute for the horse or mule which formerly drew the cars. The horse-car was accepted as a conveyance added to the numerous kinds of vehicles in use, and varying in the use of stationary tracks or railways.

Poles and wires for electric lighting have been admitted as a proper use, on the ground that the ¹³¹ streets are lighted and their general uses thereby made safer and more expeditious. Incidentally, the same use has been employed for supplying light to public, business, and private houses. Sewers have been admitted as not constituting an additional servitude because they afforded a means of drainage for the streets, although one use was in carrying the waste from buildings of the citizens. Gas mains and poles were admitted in like manner as electric lighting systems and for like uses.

In none of these cases has the inquiry been as to whether the fee-owner contemplated such uses, or whether they were in vogue at the time of the dedication. They were always deemed to constitute a beneficial use of the streets as in some degree aiding in the means or opportunities for conducting the affairs of the inhabitants, and in facilitating the communication indispensable to such affairs.

Some of the authorities, reaching the same conclusion, treat the uses of a street, arising from a dedication or condemnation, as expansive, not confined to uses already permitted, but, as civilization advances, admitting new uses: *Angell and Ames on Corporations*, sec. 312; *Julia Building Assn. v. Bell Tell. Co.*, 88 Mo. 258; 57 Am. Rep. 398; *Cater v. Northwestern Tel. etc. Co.*, 60 Minn. 539; 51 Am. St. Rep. 543; *Detroit City Ry. Co. v. Mills*, 85 Mich. 634.

In *Cater v. Northwestern Tel. etc. Co.*, 60 Minn. 539, 51 Am.

St. Rep. 543, it is said: "The question, then, is, What is the nature and extent of the public easement in a highway? If there is any one fact established in the history of society and of the law itself, it is that the mode of exercising this easement is expansive, developing and growing as civilization advances. In the most primitive state of society the conception of a highway was merely a footpath; in a slightly more advanced state it included ¹⁸² the idea of a way for pack animals, constituting, respectively, the 'iter,' the 'actus,' and the 'via' of the Romans. And thus the methods of using public highways expanded with the growth of civilization, until to-day our urban highways are devoted to a variety of uses not known in former times, and never dreamed of by the owners of the soil when the public easement was acquired. Hence it has become settled law that the easement is not limited to the particular methods of use in vogue when the easement was acquired, but includes all new and improved methods, the utility and general convenience of which may afterward be discovered and developed in aid of the general purpose for which highways are designed. And it is not material that these new and improved methods of use were not contemplated by the owner of the land when the easement was acquired, and are more onerous to him than those then in use."

Judge Elliott, in his work on Roads and Streets, page 529, quotes approvingly from Cooley's Constitutional Limitations, 556, as follows: "When land is taken or dedicated for a town street, it is unquestionably appropriated for all ordinary purposes of a town street; not merely the purposes to which such streets were formerly applied, but those demanded by new improvements and new wants. Among these purposes is the use for carriages which run on a grooved track; and the preparation of important streets in large cities for their use is not only a frequent necessity, which must be supposed to have been contemplated, but it is almost as much a matter of course as the grading and paving."

Upon this branch of our inquiries we must conclude, therefore, upon both reason and authority, that the uses of streets prevailing at the time of the taking ¹⁸³ or dedication of a street are not the limits of the uses to which the public is entitled, and which the soil-owner is deemed to have contemplated, but that such uses are to be enlarged to include all of the additional and improved methods of attaining the same objects and enjoying the same privileges, not, however, to the denial or substantial

impairment of the fee-owner's use and enjoyment of his abutting property.

Is the telephone, with its necessary poles and wires, to be regarded as a new use, so disconnected from the purposes and objects in actual and legal contemplation when our city streets were dedicated or condemned as to constitute an additional servitude?

The telegraph equipment, in its occupancy of the highway or street, and its uses is the nearest parallel we have to that of the telephone system. They are both inventions for communication by electricity. The equipment occupying the streets is the same. Some authorities have attempted to distinguish between the uses contemplated of city streets and of suburban highways. This distinction was recognized by this court in *Kincaid v. Indianapolis etc. Gas Co.*, 124 Ind. 577, 19 Am. St. Rep. 113, where this language was employed: "There is an essential distinction between urban and suburban highways, and the rights of the abutters are much more limited in the case of urban streets than they are in the case of suburban ways. We note the distinction between the classes of public ways, and declare that the servitude in the one class is much broader than it is in the other."

In Elliott's *Roads and Streets*, page 299, it is said: "There is an essential difference between urban and suburban servitudes. The owner of the dominant estate in an urban servitude has very much more authority, and much greater rights than the owner of the ¹³⁴ dominant estate in a suburban servitude. The easement of the one is very much more comprehensive than that of the other. It is doubtful whether, of all the servitudes, there is one so broad and comprehensive as that of a city in its streets." Again, the same author says, on page 307, "The easement in a city is so broad and exclusive as to leave very little, if any, private right of use in the owner of the servient estate."

If this doctrine is accepted, and we think it must be, the cases which hold that telegraph and telephone lines upon country highways are an additional servitude cannot be given much weight in determining the question before us. However, those cases which hold that these uses of the suburban ways are not an additional servitude, if their reasoning is tenable, apply to the cases of city streets with greater force than to those of country ways.

Cater v. Northwestern Tel. etc. Co., 60 Minn. 539, 51 Am.

St. Rep. 543, is such a case. In addition to the pertinent quotation already made from that case, we quote the following: "We are not unmindful that private property cannot be taken for a public use without compensation, however important that public use is. We are not forgetful of the fact that care should be taken that, in the popular zeal for modern public improvements, the burden of furnishing these improvements should not be shifted from the public, and imposed upon any particular class of individuals. But viewing, as we do, highways as being designed as public avenues of travel, traffic, and communication, the use of which is not necessarily limited to travel and the transportation of property in moving vehicles, but extends as well to communication by the transmission of intelligence, it seems to us that such a use of a highway is within the general purpose for which highways are designed, ¹³⁵ and, within the limitations which we have suggested, does not impose an additional servitude upon the land; in short, that it is merely a newly discovered method of using the old public easement."

Another case of the same character is that of *People v. Eaton*, 100 Mich. 208. It was there said: "When these lands were taken or granted for public highways, they were not taken or granted for such uses only as might then be expected to be made of them, by the common method of travel then known, or for the transmission of intelligence by the only methods then in use, but for such methods as the improvement of the country, or the discoveries of future times, might demand. . . . It would be a great calamity to the state if, in the development of the means of rapid travel, and the transmission of intelligence by telegraph or telephone communication, parties engaged in such enterprises were compelled to take condemnation proceedings before a single track could be laid or a pole set." This latter proposition can be the better appreciated by the supposition that in the city of Indianapolis a telephone company should be required to make legal condemnations as to the twenty thousand or more properties fronting upon the streets of that city.

The cases of *Pierce v. Drew*, 136 Mass. 75, 49 Am. Rep. 7, *York v. Telephone Co. v. Kessey*, 5 Pa. Dis. Rep. 366, and *Julia Building Assn. v. Bell Tel. Co.*, 88 Mo. 258, 57 Am. Rep. 398, are directly in point in holding that the erection of telephone systems upon city streets is not an additional servitude for which the adjacent fee-owner is entitled to damages, but that such use, being an improved method of transmitting intelligence, and a substitute for the messenger upon foot, on horseback, or by ve-

hicle, is within the contemplated uses at the time of the dedication.

¹³⁶ In the last case cited, it was said: "These streets are required by the public to promote trade and facilitate communications in the daily transactions of business between the citizens of one part of the city and those of another, as well as to accommodate the public at large in these respects. If a citizen living or doing business on one end of Sixth street wishes to communicate with a citizen living and doing business on the other end, or at any intermediate point, he is entitled to use the street, either on foot, on horseback, or in a carriage, or other vehicle in bearing his message. The defendants in this case propose to use the street by making the telephone poles and wires the messenger to bear such communications instantaneously and with more dispatch than in any of the above methods, or any other known method of bearing oral communications. Not only would such communications be borne with more dispatch, but, to the extent of the number of communications daily transmitted by it, the street would be relieved of that number of footmen, horsemen, and carriages. If a thousand messages were daily transmitted by means of telephone poles, wires, and other appliances used in telephoning, the street through these means would serve the same purpose, which would otherwise require its use either by a thousand footmen, horsemen, or carriages to effectuate the same purpose. In this view of it the erection of telephone poles and wires for transmission of oral messages, so far from imposing a new and additional servitude would, to the extent of each message transmitted, relieve the street of a servitude or use by a footman, horseman, or carriage."

In the case of *Pierce v. Drew*, 136 Mass. 75, 49 Am. Rep. 7, a like reasoning is adopted. It is there said: "The discovery of the telegraph developed a new and valuable mode of communicating intelligence. Its use is certainly similar ¹³⁷ to, if not identical with, that public use of transmitting information for which the highway was originally taken, even if the means adopted are quite different from the post-boy or the mail-coach. It is a newly discovered method of exercising the old public easement, and all appropriate methods must have been deemed to have been paid for when the road was laid out."

In *Hershfield v. Rocky Mountain etc. Tel. Co.*, 12 Mont. 102, it was held that the telephone equipment was not a new and additional burden upon the fee in a city street, quoting with approval from *Julia Building Assn. v. Bell Tel. Co.*, 88 Mo. 258; 57

Am. Rep. 398. It is true that it was further held that the fee in the street was not in the abutting owner, but the proposition is distinctly adopted that it is germane to the proper use of streets to allow the setting of poles and wires for the telephone.

In *McCormick v. District of Columbia*, 4 Mackey, 396, 54 Am. Rep. 284, the right of the telephone system to occupy the streets as a proper street use was held. The same right was recognized in *Irwin v. Great Southern Tel. Co.*, 37 La. Ann. 63, but it was placed upon the rule that the abutting owner could not complain since the fee in the streets was in the public.

We observe no means of distinguishing against the telephone equipment, on the ground that its poles are not in motion as are ordinary instruments of travel, since the permanent occupancy by the trolley poles, the gas and water pipes, et cetera, is maintained: See *People v. Eaton*, 100 Mich 208; *York Telephone Co. v. Keeseey*, 5 Pa. Dis. Rep. 366.

If the existence of private benefit to the fee-owner were the turning point between the admission of those things not instruments of travel or movement, as the fire cistern, the illuminating and heating gases, the ¹³⁸ waterpipes, sewers, et cetera, and the telephone, it would be exceedingly difficult to establish the absence of private benefit to the property owner and business man in the employment of the telephone.

Opposed to the view of the question as we have presented it are cited several authorities: *Stowers v. Postal Telegraph Cable Co.*, 68 Miss. 559, 24 Am. St. Rep. 290, involved the right to place telegraph poles upon the sidewalk in the city of Vicksburg. The controlling portion of the opinion is as follows: "There is some conflict in the authorities, but the decided weight is to the effect that telegraph companies form no part of the equipment of a public street, but are foreign to its use, and that where the abutting owner is the owner of the fee to the center of the street he is entitled to additional compensation for the additional burden placed upon his land: *Lewis on Eminent Domain*, sec. 131, citing *Board of Trade Tel. Co. v. Barnett*, 107 Ill. 507, 47 Am. Rep. 453; *Dusenbury v. Mutual Tel. Co.*, 11 Abb. N. C. 440; *Metropolitan Tel. Co. v. Colwell Lead Co.*, 18 Jones & S. 488; *Broome v. New York etc. Tel. Co.*, 42 N. J. Eq. 141; contra, *Hewett v. Western Union Tel. Co.*, 4 Mackey, 424; *Pierce v. Drew*, 136 Mass. 75, 49 Am. Rep. 7; *Julia Building Assn. v. Bell Tel. Co.*, 88 Mo. 258, 57 Am. Rep. 398." All of the cases cited by the court as in conflict with its opinion have been cited by us. Those cited in support of the opinion are by reference to *Lewis*

on Eminent Domain, where the text is supported by the four cases first named by the court. Of those cases, Board of Trade Tel. Co. v. Barnett, 107 Ill. 507, 47 Am. Rep. 453, involved the location of a telegraph pole in a rural highway, as did also Dusenbury v. Mutual Tel. Co., 11 Abb. N. C. 440. In Broome v. New York etc. Tel. Co., 42 N. J. Eq. 141, the statute authorizing the establishment of a system required that the consent, in writing, of the property owner should be procured for the purpose and without such consent the right was denied. The one case cited in the Stowers case giving it any support was Metropolitan Tel. Co. v. Colwell Lead Co., 18 Jones & S. 488. ¹³⁹ That case broadly asserts that the telegraph service is not a street use. That conclusion is at variance with our conclusion.

Among the other cases cited by counsel for the appellant are Eels v. American Tel. etc. Co., 143 N. Y. 133; Western etc. Co. v. Williams, 86 Va. 696, 19 Am. St. Rep. 908, and Pacific etc. Cable Co. v. Irvine, 49 Fed. Rep. 113, in each of which the question was as to the erection of telegraph poles upon a rural highway and, if the distinction heretofore maintained is correct, are not authorities in this case.

In Willis v. Erie Tel. etc. Co., 37 Minn. 347, the judgment of the trial court holding the telephone pole upon the city street an additional servitude, was affirmed, upon a division of the court, and for the lack of a majority for either side of the question. It is therefore of little force as an authority.

The only other decision, thought to be analogous, to which we have been cited, or which our extended researches have discovered, is that of Chesapeake etc. Co. v. Mackenzie, 74 Md. 36; 28 Am. St. Rep. 219. In that case the complaint was held sufficient upon the general allegation that the pole planted in the footway in front of the plaintiff's warehouse "obstructs and prevents the comfortable and reasonable and beneficial enjoyment and use of said premises" without permission and without payment of compensation. It was held to present a cause of action for a direct interference with the use of the warehouse, and the question of the use of a street or a highway as an additional servitude was expressly held not to be involved. It was held also that the legislature had not and could not authorize the substantial impairment of such beneficial enjoyment of one's property. We do not, therefore, regard that case as in point. Nor do we regard ¹⁴⁰ the New York elevated steam railway cases as in point. Those cases correctly held, as we think, that the use of the street for such

railway was an obstruction of the easements of access, light, and air, if not an unanticipated street use.

Textwriters, justly renowned, have grouped many of the cases cited by us, and have variously expressed the opinion that the weight of authority forbids the use of an urban way for telephone equipment. We have found, however, no analysis of the cases, and no attempt by such writers to classify the cases applying to urban and suburban ways, and no effort has been made by them to consider the reasons supporting the cases which uphold the use as within the scope of proper street uses.

As we have seen, there are but two decisions of authoritative force supporting the contention of the appellant. Those decisions involved the use of the telegraph equipment, a use, as we have said, more nearly like that of the telephone than any other. The telegraph, however, has never been employed as a means of interurban communication. It requires skilled persons to receive the messages, and then they are to be carried to the persons for whom they are intended by just such means and uses of the streets as would other written communications. The telephone is particularly useful in communications between the people within a city, and it can be used for that purpose directly, and by persons without special skill. It is more clearly a substitute for the old methods of the communication of messages between persons within the city than the telegraph.

We conclude that the reasonable use of the streets of a city for the equipment of a telephone system is not a new and additional servitude for which the abutting property owner is entitled to compensation. ¹⁴¹ Nor do we agree that the ordinary pole and wires are necessarily a special injury to the enjoyment of the abutting property.

Nor do we agree with the appellant that a telephone system may not be owned and conducted by an individual because of the grant, by the legislature, of such rights to corporations. An individual may conduct any proper business without legislative assent, unless there has been some legislative restrictions upon such right.

If, in the present case, the appellant had been entitled to restrain the use because an additional servitude, the appellee could not have taken the use without an agreement with the appellant or some legislative power to condemn. That question is put at rest by the holding that there is no additional servitude in the erection of the pole.

The judgment of the lower court is affirmed.

HIGHWAYS — ADDITIONAL SERVITUDES — TELEPHONE LINE.—The adjudged cases upon the question raised in the principal case present an irreconcilable conflict of authority, and seem to be about equally divided. It seems, however, that the later cases, and perhaps the weight of authority, sustain the doctrine without qualification that a telegraph or telephone line along a public street or highway is no part of the equipment of the street, but is foreign to its use, and the imposition of an additional servitude for which the abutting owner must be compensated: See monographic note to *Chesapeake etc. Tel. Co. v. Mackenzie*, 28 Am. St. Rep. 229; *Postal Tel. Cable Co. v. Eaton*, 170 Ill. 513; 62 Am. St. Rep. 390. Contra, and in accord with the principal case, *Cater v. Northwestern Telephone etc. Co.*, 60 Minn. 539; 51 Am. St. Rep. 543, and note.

HIGHWAYS — NEW USES OF.—It can be said to have been within the legal contemplation of all that a public highway should, from time to time, be used for all purposes by which the object of its creation could be promoted: *Green v. City etc. Ry. Co.*, 78 Md. 294; 44 Am. St. Rep. 288. A public street may be applied to all purposes which are not subversive of its proper use, nor inconsistent with the uses contemplated in its dedication, grant, or condemnation: *Gaus etc. Mfg. Co. v. St. Louis etc. R. R. Co.*, 113 Mo. 308; 35 Am. St. Rep. 706, and note.

BAUM v. THOMS.

[150 INDIANA, 378.]

USURY—REMEDY OF ONE WHO HAS SUBMITTED TO.—A borrower who has paid more than legal interest is not restricted to the remedy given by statute, but may maintain an action of assumpsit to recover the excess of interest paid on paying, or offering to pay, the money loaned with legal interest.

STATUTE—REPEAL OF—EFFECT ON RESTORING A COMMON-LAW RULE OR REMEDY.—Where a statute or rule of common law is repealed or modified, and the repealing or modifying act is afterward expressly or impliedly repealed by an act which manifests no intention that the statute or common-law rule repealed or modified shall continue repealed or modified, the repeal of the repealing or modifying act revives the act or common-law rule so repealed or modified.

USURY—PAYMENT OF IS NOT DEEMED VOLUNTARY.—A payment of usurious interest is regarded as made under the constraint of a formal, though illegal, contract, obtained by taking advantage of the necessities of the borrower, and is, therefore, excepted from the ordinary rule that one voluntarily paying money on an illegal scheme cannot maintain an action to recover such payment.

PRACTICE.—If a motion, taken as a whole, is not sustainable, the court is justified in denying it, though the moving party is entitled to a part of the relief sought.

John W. Keeling and Charles Averill, for the appellants.

Hez. Dailey, H. M. Wygatt, G. R. Estabrook and G. W. Spahr, for the appellee.

379 MONKS, J. Appellee brought this action against appellants to set aside and cancel a note and mortgage executed by

her, and to recover usurious interest paid to appellants.

The court tried said cause, and made a general finding in favor of appellee, and, over the separate motion of each appellant for a new trial, judgment was rendered in favor of appellee. Appellants filed separate motions to modify the judgment which were overruled.

The errors assigned call in question the sufficiency ³⁸⁰ of the complaint, the action of the court in overruling the motions for a new trial, and in overruling the motions to modify the judgment.

The complaint charges, in substance, that the defendants in the court below were engaged in the business of loaning money at usurious interest, and that, while they had separate places of business, they had an understanding and arrangement between themselves by which the loans were changed from one to the other in order the more successfully to carry on the business of loaning money at illegal and usurious interest; that appellee borrowed twenty-five dollars in 1891, and fifty dollars in 1892, under agreement that she was only to pay interest at the legal rate, and that she paid thereon, principal and interest, one hundred and seventy-five dollars, when in 1894 they claimed that there was yet due one hundred and fifty dollars—when in fact the sum loaned had been fully paid, principal and legal interest, and she had paid them in addition thereto fifty dollars usurious interest on said loan; that she finally executed the mortgage and note for one hundred and twelve dollars and sixty cents, set out in the complaint, on account of the threats, importunities, and oppressive conduct of the parties, which are set forth in the complaint at great length. It is evident that said complaint was sufficient to withstand a demurrer for want of facts.

The causes assigned for a new trial are: 1. That the decision of the court was not sustained by sufficient evidence; 2. That the decision of the court is contrary to law; 3. That the damages assessed are excessive; 4. Error in the assessment of the amount of recovery, the same being too large.

It is insisted by appellant Mackey, to whom the note and chattel mortgage in controversy were executed, that the evidence shows that he loaned one hundred and five dollars and ten cents to appellee and took said note and chattel mortgage for one hundred and twelve dollars and fifty cents, and that said appellee borrowed the same to ³⁸¹ pay what she owed appellant Baum, and that, when said note and mortgage were executed, a check for one hundred and five dollars and ten cents was delivered to ap-

pellee, and that she at the time wrote her name across the back of said check, and the same was taken away by appellant Baum, whose claim the one hundred and five dollars and ten cents was borrowed to pay, and that, therefore, the finding was not sustained by the evidence.

There was evidence to the effect claimed, but the court may have concluded from all the evidence that appellants were acting in concert, and that the check was given in order to cover up the real transaction, which was to procure the note and mortgage for an indebtedness which was already more than paid, and at the same time give it the appearance of a new loan, and thus cut off the defense of usury. To support such conclusion it was not necessary that anyone should testify that such was the purpose of the transaction, or that there was an agreement or understanding between appellants to that effect, or that the money received on said check was returned by Baum to Mackey after the note and mortgage were executed. Such facts may be established by circumstantial evidence. The trial court heard the witnesses testify, saw their manner and conduct while testifying, and was the exclusive judge of their credibility, and was able to determine whether said affair in giving the note and mortgage to appellant Mackey, and the delivery of the check to appellee, and the indorsement by her of the same to Baum, was what it appeared to be, a new loan to appellee, or whether it was a mere form, a sham arranged to deceive and mislead appellee, and cover up the real transaction.

It is next insisted that while usurious interest voluntarily paid may, under section 7046 of Burns' Revised Statutes of 1894 (Horner's Rev. Stats. 1897, sec. 5201), be recouped by the ~~382~~ debtor in an action on the contract affected by such usury, the same cannot be recovered back in a direct action, and that therefore the finding and judgment against appellants for usurious interest paid by appellee was contrary to law.

Whatever the rule may be in other states, it has been uniformly held in this jurisdiction that usurious interest could at common law be recovered back in an action brought for that purpose: *Lacy v. Brown*, 67 Ind. 478, and cases cited; *Musselman v. McElhenny*, 23 Ind. 4, 6; 85 Am. Dec. 445; *Wood v. Kennedy*, 19 Ind. 68; *Smead v. Green*, 5 Ind. 308, 309; *Berry v. Makepeace*, 8 Ind. 154; *State Bank v. Ensminger*, 7 Blackf. 105, 107, and cases cited. See note to *Crawford v. Harvey*, 1 Blackf., 2d ed., 382. See, also, *Palmer v. Lord*, 6 Johns Ch. 95, 100-106; *Wheaton v. Hibbard*, 20 Johns. 290, 292, 293; 11 Am. Dec. 284;

Nichols v. Bellows, 22 Vt. 581; 54 Am. Dec. 85, and note; Bexar etc. Assn. v. Robinson, 78 Tex. 163; 22 Am. St. Rep. 36, and note 41; Zeigler v. Scott, 10 Ga. 389; 54 Am. Dec. 395, and note 400-402; 27 Am. & Eng. Ency. of Law, 959, and cases cited in notes 3 and 4.

The rule is, that the borrower who has paid more than the legal rate of interest is not confined to the remedy given by statute, but may maintain assumpsit at common law to recover back the excess of interest paid, on paying or offering to pay the money lent with lawful interest: *Berry v. Makepeace*, 3 Ind. 154; *Palmer v. Lord*, 6 Johns. Ch. 95; *Wheaton v. Hibbard*, 20 Johns. 290; 11 Am. Dec. 284.

The Revised Statutes of 1843, sections 25, 26, page 580, fixed the legal rate of interest per annum, and section 29, page 581, provided that: "No contract or assurance for the payment of money with interest, or upon which interest has been received, contracted for, taken, or reserved, after a greater rate than is allowed by the preceding sections of this article, shall be thereby rendered void; ³⁸³ but whenever, in any action brought on such contract or assurance, it shall appear upon a special plea to that effect, or otherwise, that a greater rate of interest has been directly or indirectly reserved, contracted for, taken, or received, than is allowed by law, the defendant shall recover his full costs in such suit, and the plaintiff shall only recover judgment for the principal sum due him without interest thereon; or if he shall have taken or received such interest, or any part thereof, before the rendition of such judgment, the same shall be deducted from such principal sum, and the judgment shall be rendered for the balance as above."

It was provided in section 30, page 581, that: "Any person who shall have paid a greater amount of interest or value than is above allowed, or his personal representatives, may recover against the person or the corporation who shall have taken the same, or against the personal representative of such person, the whole amount of interest or value which he may have paid, if such action be brought within a year after the payment of the same."

In *Berry v. Makepeace*, 3 Ind. 154, the appellant sued appellee to recover usurious interest paid in excess of six per cent per annum, the legal rate fixed by the Revised Statutes of 1843. Appellee, upon the theory that the action was brought under section 30, page 581, Revised Statutes of 1843, to recover the whole amount of interest paid, filed a plea which in effect alleged that

the action was not brought within a year after the payment of such usurious interest. This court held that the action was not brought under said section 30 of the statute to recover the whole amount of interest paid, but was to recover the interest paid in excess of the legal rate, and that such action could be maintained at common law independently of the statute. The court said: ³⁸⁴ "The plea might have been applicable if the action had been brought under the statutory provision (Rev. Stata., c. 31, sec. 30, p. 581), to recover the whole of the interest paid as illegal, but such is not the case. The suit is for the excess of interest paid, which may be recovered back in this form of action, by the common law, and independently of the statute of the state: *State Bank v. Ensminger*, 7 Blackf. 105."

This rule of the common law, that usurious interest could be recovered back, was modified by statute in 1865, when the legislature passed an act (Acts Special Session, 1865, p. 176; 3 Davis' Rev. Stata. 1876, p. 316; 1 Davis' Rev. Stats. 1876, p. 600), amending sections 5 and 6 of the act of 1861, regulating interest on money: Acts 1861, p. 138; 2 Gavin & Hord's Revised Statutes, Annotated, 656, 657. The last clause of said section 5, as amended, provided: "That in all cases in which money or anything of value shall have been voluntarily paid as interest for the loan, use, or usance of money the same shall not be recovered back, either directly or by way of setoff or counterclaim or payment." While this section as amended was in force, usurious interest voluntarily paid could not be recovered back in a direct action for that purpose, nor could the debtor, in any action against him by the party receiving such usurious interest, recover the same back by way of setoff, counterclaim, or payment: *Bowen v. Phillips*, 55 Ind. 226, 235, 236.

In *Musselman v. McElhenny*, 23 Ind. 4, 85 Am. Dec. 445, decided at the November term, 1864, under the interest law of 1861, and before the amendment of section 5 in 1865, this court, at page 6, said: "If usurious interest is paid on the note after its execution, it amounts to a payment of so much on the principal of the note; and if the amount thus paid exceeds the principal, it may be recovered back."

³⁸⁵ In 1867 the legislature passed an act entitled, "An act concerning interest on money, and to provide for the recoupment of usurious interest," section 2 of which act contained the following provision: "All interest exceeding the rate of ten per centum per annum shall be deemed usurious and illegal, as to the excess

only, and in any action upon a contract affected by such usury, such excess may be recouped by the defendant, whenever it has been reserved or paid before the beginning of the suit"; Acts 1867, p. 151; 3 Davis' Rev. Stats. 1876, p. 317; 1 Davis Rev. Stats. 1876, p. 599. Said act of 1867 contained no repealing clause, but it repealed by implication so much of the amended section 5, *supra*, passed in 1865, as prohibited the recoupment of usurious interest in an action brought upon the contract affected by such usury, but the prohibition in said amended section 5 against the recovery of usurious interest voluntarily paid in a direct action or by way of setoff, or recoupment, in any action brought by the party receiving such usurious interest upon any contract other than the one affected by such usury, was not repealed in any manner by the act of 1867, but remained in force as a part of the law of this state: *Holcraft v. Mellott*, 57 Ind. 539, 543, 544.

Under said act of 1867, in an action on the contract affected by usury, if the excess of the interest voluntarily paid by the debtor over ten per centum per annum, amounted to more than the balance due on the note sued upon, he could only recoup to the extent of such balance due on the note, and on account of the unrepealed prohibition contained in said amended section 5, *supra*, could not recover a judgment for the excess of such usurious interest over the amount due on said note: *Holcraft v. Mellott*, 57 Ind. 544.

~~386~~ In 1879 the legislature passed "An act concerning interest and usury" (Acts 1879, p. 43, 44; Burns' Rev. Stats. 1894, secs. 7043-7050; Horner's Rev. Stats. 1897, secs. 5198-5205), the last section of which repealed in express terms all acts on the subject of interest. The amended section 5, *supra* (Acts Special Session 1865, p. 176; 3 Davis' Rev. Stats. 1876, p. 316; 1 Davis' Rev. Stats. 1876, p. 600), which prohibits the recovery of usurious interest voluntarily paid, was therefore repealed by section 7050 of Burns' Revised Statutes of 1894: Horner's Rev. Stats. 1897, sec. 5205.

Where a statute or rule of the common law is repealed or modified, and the repealing or modifying act is afterward expressly or impliedly repealed by an act which manifests no intention that the statute or common-law rule repealed or modified shall continue repealed, the common-law rule is, that the repeal of the repealing or modifying act revives the act or common-law rule so repealed or modified: *Doe v. Naylor*, 2 Blackf. 32; *Lindsay v. Lindsay*, 47 Ind. 283, and cases cited; *Teter v. Clayton*, 71 Ind.

237; Mathewson v. Phoenix Iron Foundry, 20 Fed. Rep. 281; State v. Rollins, 8 N. H. 550; Gray v. Obear, 54 Ga. 231; Den v. Du Bois, 16 N. J. L. 285; Hastings v. Aiken, 1 Gray, 163; 23 Am. & Eng. Ency. of Law, 517; Bishop on Statutory Crimes, sec. 186; Endlich on Interpretation of Statutes, sec. 475.

The common-law rule in regard to the effect of the repeal of a repealing act has been changed so far as the same applies to acts of the legislature, by section 248 of Burns' Revised Statutes of 1894 (Horner's Rev. Stats. 1897, sec. 248), which was enacted in 1877: Acts 1877, p. 73; Teter v. Clayton, 71 Ind. 237. Whether said section 248, supra, changes the rule as to the effect of the repeal of an act modifying a former act of the legislature we need not determine. See, however, Bank of Savings v. Collector, 3 Wall. 495; Smith v. Hoyt, 14 Wis. 252; 23 Am. & Eng. Ency. of ³⁸⁷ Law, 519, and note 2; Endlich on Interpretation of Statutes, sec. 476.

The rule, however, in regard to the repeal of an act repealing or modifying a rule of the common law remains unchanged, and the repeal of the act repealing or modifying the common rule revives the common rule ab initio, and it exists the same as if it had never been repealed. The time during which statutes repealing the common-law rule remain in force is regarded only as a suspension of such rule of the common law: Winter v. Dickerson, 42 Ala. 92; Johnson v. Meeker, 1 Wis. 436; Commonwealth v. Getchell, 16 Pick. 452; Endlich on Interpretation of Statutes, sec. 475.

Said act of 1879 took effect May 31, 1879, since which time the common-law rule in regard to the recovery of usurious interest, as declared in State Bank v. Ensminger, 7 Blackf. 105, and the cases following it, has been in force in this state the same as it was before the taking effect of the amended section 5, supra, in 1865.

It is true that section 4 of the act of 1879, being section 7046 of Burns' Revised Statutes of 1894 (Horner's Rev. Stats. 1897, sec. 5201), provides that: "When a greater rate of interest than is hereby allowed [eight per cent] shall be contracted for, the contract shall be void as to the usurious interest contracted for; and in an action on such contract, if it appear that interest at a higher rate than eight per cent has been directly or indirectly contracted for, the excess of interest over six per cent shall be deemed usurious and illegal, and in an action on a contract affected by such usury, the excess over the legal interest may be recouped by the debtor, whenever it has been reserved or paid before the bringing of the

suit." But as we have shown, the borrower is not confined to the remedy given by statute, but may resort to the remedy given by the common ³⁸⁸ law: *State Bank v. Ensminger*, 7 Blackf. 105; *Smead v. Green*, 5 Ind. 308; *Lacy v. Brown*, 67 Ind. 478; *Palmer v. Lord*, 6 Johns. Ch. 95; *Wheaton v. Hibbard*, 20 Johns. 290; 11 Am. Dec. 284.

The payment of usurious interest is not a voluntary payment in such sense as to entitle the receiver to retain the amount paid above legal interest, but such payment is regarded as under the constraint of a formal, though illegal, contract, obtained by taking advantage of the necessities of the borrower, and therefore excepted from the ordinary rule that one voluntarily paying money on an illegal claim cannot maintain an action to recover such payment: *Wheaton v. Hibbard*, 20 Johns. 290; 11 Am. Dec. 284; *Schroepel v. Corning*, 5 Denio 236; *Peterborough Sav. Bank v. Hodgdon*, 62 N. H. 300; *Willie v. Green*, 2 N. H. 333; *Caughman v. Drafts*, 1 Rich. Eq. 414; *Fay v. Lovejoy*, 20 Wis. 403; *Wood v. Lake*, 13 Wis. 84; *First National Bank v. Plankinton*, 27 Wis. 177; 9 Am. Rep. 453; *Grow v. Albee*, 19 Vt. 540; *Williams v. Wilder*, 37 Vt. 613; *Scott v. Leary*, 34 Md. 389; *Philanthropic Bldg. Assn. v. McKnight*, 35 Pa. St. 470; *Thomas v. Shoemaker*, 6 Watts & S. 179-183; note to *Ziegler v. Scott*, 54 Am. Dec. 400-402; note to *Bexar etc. Assn. v. Robinson*, 22 Am. St. Rep. 41; note to *Davis v. Garr*, 55 Am. Dec. 398-400; 2 Ency. of Pl. & Pr., 1019, 1020, and note on usury.

It follows, therefore, that in the absence of a statute expressly prohibiting it, usurious interest which has been paid by a debtor may be recovered in a direct action, or in any action brought by the person receiving such usurious interest, on a contract express or implied against such debtor. Since the repeal of the amending act of 1865, *supra*, by the act of 1879, *supra*, there has been no statute in this state prohibiting the recovery of usurious interest paid by a debtor.

It is clear from what we have said and the authorities ³⁸⁹ cited, that in this state, since the taking effect of the interest law of 1879, a borrower who has paid usurious interest may recover the same in a direct action brought for that purpose, or, if the person receiving the usurious interest sues him upon the contract affected by such usury, or upon any other contract for the payment of money, he may recover the same by way of setoff, recoupment, payment, or counterclaim, as the facts of the case may permit, the same as could have been done before the passage of the amendatory act of 1865.

It is next insisted that the court erred in overruling the separate motions of appellants to modify the finding and judgment of the court. The court made a general finding in favor of appellee, and the amount she was entitled to recover, and that the same was "collectible without the benefit of exemption laws." Judgment was rendered for the amount of the finding, and also provided that the same was "collectible without the benefit of exemption laws."

Appellants made separate motions to modify the general finding and judgment by striking out of the finding and out of the judgment the amount of the recovery, and the words "collectible without the benefit of exemption laws." It is insisted by appellants that the amount of the recovery stated in the finding and judgment should have been stricken out because the amount is for usurious interest paid, and the same cannot be recovered in a direct action, but can only be recouped in an action on the contract affected by the usury, and that the words "collectible without the benefit of exemption laws" should have been stricken out, because "the finding proceeds upon the theory that appellee was entitled to recover for usurious interest paid, which is not a tort." Each of said motions was overruled as a whole, to which ruling of the court appellants each excepted.

⁸⁹⁰ As we have already held that appellee had the right to recover in a direct action usurious interest paid, it would have been error for the court to have sustained a motion to strike out the amount of recovery in the finding and judgment. The court did not err, therefore, in overruling each of said motions as a whole, even if it would have been error to have overruled motions to modify the judgment by striking out the words "collectible without the benefit of exemption laws" and asking no other relief. Whether such a motion should have been sustained, if made, we need not, and do not, decide. The rule is, that it is not error to overrule motions to modify judgments or interlocutory orders or motions to strike out evidence, pleadings, judgments or interlocutory orders, where they are not well taken as a whole: *Spencer v. Board etc.*, 117 Ind. 573, 584; *Heberd v. Wines*, 105 Ind. 237, 239, 240; *Mathews v. Droud*, 114 Ind. 268, 271, 272; *Pape v. Wright*, 116 Ind. 502, 508-509, and cases cited; *Waymire v. Lank*, 121 Ind. 1; *Snideman v. Snideman*, 118 Ind. 162, 164; *Binford v. Young*, 115 Ind. 174, 176, and cases cited; *Louisville etc. Ry. Co. v. Falvey*, 104 Ind. 409, 416; *Carver v. Louthain*, 38 Ind. 530, 541; *Western Union Tel. Co. v. State*, 147 Ind. 274, 277.

Finding no available error in the record, the judgment is affirmed.

USURY—REMEDY AFTER PAYMENT OF.—Payment of usurious interest is regarded as made under moral duress, and is therefore excepted from the operation of the ordinary rule that voluntarily paying an illegal claim estops the payor from maintaining an action to recover such payment: *Note to Bexar Building etc. Assn. v. Robinson*, 22 Am. St. Rep. 41. One who has paid more than the legal rate of interest may recover the excess in an action of assumpsit, and is not limited to the remedy prescribed by the statute to prevent usury. But to entitle the plaintiff to recover, he must show that he has done all that equity requires: *Wheaton v. Hibbard*, 20 Johns. 290; 11 Am. Dec. 284; *Musselman v. McElhenny*, 23 Ind. 4; 85 Am. Dec. 445; monographic note to *Davis v. Garr*, 55 Am. Dec. 399, 400. Compare *Ferguson v. Soden*, 111 Mo. 208; 33 Am. St. Rep. 512.

STATUTES—REPEAL OF REPEALING STATUTE—EFFECT. The repeal of a repealing statute revives the original statute: *Collins v. Smith*, 6 Whart. 294; 36 Am. Dec. 228; monographic note to *Wharton v. State*, 94 Am. Dec. 219, 220.

PITTSBURGH, CINCINNATI, CHICAGO, AND ST. LOUIS RAILROAD COMPANY v. FRAZE.

[150 INDIANA, 576.]

PRACTICE.—A pleading cannot be rejected or struck out as sham when it does not plainly appear to be false, where the conclusion that it is false can be reached only by weighing and balancing the probabilities arising from certain physical facts.

RAILWAYS—PRESUMPTION RESPECTING A PERSON INJURED WHILE CROSSING.—When a person crossing a railway track is injured by collision with a train, the fault is prima facie his own, and he must show affirmatively that his fault or negligence did not contribute to the injury, before he is entitled to recover therefor.

RAILWAYS—CROSSINGS—DUTY OF TRAVELERS AT.—In attempting to cross a railway track, a traveler must listen for signals, notice signs put up as warnings, and look attentively up and down the track. If a traveler, by looking, could have seen an approaching train in time to escape, it will be presumed, in case he is injured by a collision, either that he did not look, or, if he did look, that he did not heed what he saw.

RAILWAY CROSSINGS.—The testimony of the plaintiff injured at a railway crossing by collision with a train that he looked and listened is not sufficient to support a verdict in his favor if the physical facts are such that if he did look and listen attentively, he must have heard or seen the approaching train in time to escape injury therefrom.

S. Stansifer and Applewhite & Applewhite, for the appellant.

A. N. Munden, for the appellee.

576 McCABE, J. The appellee sued the appellant to recover damages resulting from a personal injury to appellee, at a place

where appellant's railway is crossed by a highway, caused, as is alleged, by the negligence of appellant. The issues were tried by a jury, resulting in a verdict for the plaintiff, upon which judgment was rendered, over appellant's motion for a new trial. The trial court overruled a demurrer to the complaint, and overruled appellant's motion to reject the complaint. Upon these several rulings alone error is assigned by appellant. The court, we think, properly overruled the motion to reject the complaint. The statute requires the court not only to reject, as sham, ⁵⁷⁷ an answer, but any other pleading "either when it plainly appears upon the face thereof to be false in fact, and intended merely for delay, or when shown to be so by answers of the party to special written interrogatories propounded to him to ascertain whether the pleading is false": Burns' Rev. Stats. 1894, sec. 385, Rev. Stats. 1881, sec. 382. The appellant propounded interrogatories to appellee for that purpose, and they were answered by him. The object of such interrogatories, and the answers of appellee thereto, was to show that the allegation in the complaint that he was free from contributory negligence was false. The particular contributory negligence sought to be shown by the answers to the interrogatories was whether appellee looked both ways and listened attentively for a coming train of cars, and whether he saw the train in time to avoid, as he approached the crossing, injury thereby. Appellee's answers to the interrogatories specifically and directly state that he did so look and listen, and did not see the train in time to avoid the injury he suffered thereby. But appellant contends that the answers disclose a number of physical facts and surrounding circumstances sufficient to show that the answers to such interrogatories were false, either in stating that appellee did so look and listen, or, if he did so look and listen, that he did not see the train. Such a state of facts does not comply with the statute requiring the rejection of the pleading as sham for its falsity. It must plainly appear, either upon its face, or by answers to the interrogatories, to be false. Here it does not plainly appear on the face of the complaint, nor does it so appear from answers that the particular allegation mentioned is false. The trial court could only reach the conclusion that it was false by weighing and balancing the probabilities arising ⁵⁷⁸ from certain inferences to be drawn from physical facts, the lay of the land, the railroad track and the highway; the presence or absence of obstructions to the sight of the coming train, stated in said answers to said interrogatories, tending to show that appellee might have seen the same as he approached the crossing. In

other words, the court below was required to weigh and determine whether the physical facts and surrounding circumstances set forth in said answers were sufficient, as appellant contends they were, to overcome and destroy the appellee's positive statement that he did look both ways and listened attentively as he approached the crossing, and failed to see or hear the train in time to avoid being struck thereby. In such a case, the question of fact thus presented cannot be tried and determined on a motion to reject the pleading: Bliss on Code Pleading, 3d ed., sec. 422, and authorities there cited. There was no error in overruling the motion to reject.

Only two points are urged under the motion for a new trial, namely, that the circuit court erroneously refused certain instructions, and that the evidence is not sufficient to establish appellee's freedom from contributory fault.

The substance of the seventeenth instruction asked by appellant and refused by the court, is as follows: "If the evidence fails to satisfy your minds by a preponderance, that the plaintiff, by diligently listening for trains, and diligently looking behind him or in the direction of the train, could not have seen or heard said train at any time or place as he approached the crossing, and before too near to it, then . . . I instruct you that the law demands that your verdict be for the defendant." In view of the evidence in the case this instruction was peculiarly applicable, and ought to have been given, if it correctly expresses the law.

579 It has been repeatedly affirmed by this court that: "When a person crossing a railroad track is injured by a collision with a train, the fault is, prima facie, his own, and he must show affirmatively that his fault or negligence did not contribute to the injury, before he is entitled to recover for such injury": *Hathaway v. Toledo etc. Ry. Co.*, 46 Ind. 25; *Cincinnati etc. Ry. Co. v. Butler*, 103 Ind. 31; *Mann v. Belt R. R. etc. Co.*, 128 Ind. 138; *Smith v. Wabash R. R. Co.*, 141 Ind. 92; *Cincinnati etc. Ry. Co. v. Duncan*, 143 Ind. 524; *Lake Erie etc. R. R. Co. v. Stick*, 143 Ind. 449.

It is also thoroughly established law in this state that: "In attempting to cross, the traveler must listen for signals, notice signs put up as warnings, and look attentively up and down the track. . . . If a traveler, by looking, could have seen an approaching train in time to escape, it will be presumed, in case he is injured by a collision, either that he did not look, or, if he did look, that he did not heed what he saw": *Mann v. Belt R. R.*

etc. Co., 128 Ind. 138; Lake Erie etc. R. R. Co. v. Stick, 143 Ind. 449.

It is also established that the law will assume that such person "actually saw what he could have seen, if he had looked, and heard what he could have heard, if he had listened": Cones v. Cincinnati etc. Ry. Co., 114 Ind. 328; Lake Erie etc. R. R. Co. v. Stick, 143 Ind. 449.

The law then will presume that this appellee saw the train in time to escape, if he could have seen it by looking, and heard it also in time to escape, if he could have heard it had he attentively listened. Then how necessary it was to instruct the jury, as requested in the seventeenth instruction, that in case appellee had failed to prove that he could not see or hear the ⁵⁸⁰ train in time to escape, he must fail. The burden being on him to prove his freedom from fault or contributory negligence, it is not enough to prove that he looked and listened without seeing or hearing the train in time to escape. Why? Because the law, as we have seen, will presume he both saw and heard it if the other facts in evidence are such as to clearly show that he could have seen it, or heard it, or both, in time to escape, if he had looked or listened. And the evidence was such as to justify and legally require the giving of such an instruction. It left the question of fact to the jury to determine, that is, whether the evidence had failed to prove that the plaintiff, by attentively looking and listening, could not have seen or heard the train in time to escape. In case the evidence did so fail, the instruction is that the verdict must be for the defendant; because in that event the plaintiff has not established his freedom from contributory negligence, even though he has sworn that he looked and listened without seeing or hearing the train in time to escape. This is so, because physical facts established beyond dispute may be of such a nature as to overcome conclusively mere verbal statements sworn to. If the physical facts in evidence were such as to show clearly that appellee could have seen the train in time to escape if he had looked, or heard it in time to have escaped had he listened, it is clear that he could not recover, even though he testified that he both looked and listened for it, and did not see or hear it in time to escape. It is true that puts upon him the burden of proving, not only that he looked and listened for the train and did not see or hear it in time to escape, but also that he could not have seen or heard it, by looking and listening for it, in time to escape. This is the law, because, if he is not required to prove, as the seventeenth instruction ⁵⁸¹ directs, that he could not have either

seen or heard the train in time to escape by looking or listening, then he may recover in the face of physical facts in evidence showing that it was a moral impossibility for him to fail to see the train, or fail to hear it in time to escape, had he looked or listened for it attentively. To hold otherwise would violate the rule already mentioned, long established here and elsewhere, that a traveler approaching a railroad crossing of a highway is presumed in law to have seen what he could have seen, if he had looked attentively, and to have heard what he could have heard, if he had listened attentively. The reason of this presumption is, that it was the traveler's solemn duty to look attentively when approaching such a crossing, and listen attentively for a coming train. This duty only relates to coming trains or vehicles on the railroad track, and hence the presumption that he saw and heard what he might have seen and heard relates only to coming trains or vehicles on the railroad track.

Appellee's counsel insist that there was no available error in refusing the seventeenth instruction, even though it correctly stated the law, because the twelfth instruction given by the court, at appellant's request, as is claimed, covers the same ground covered by the refused instruction. But we have examined that instruction, and find that it does not embrace the peculiar element embraced in the seventeenth, which we have been discussing, nor was there any instruction given by the court that did embrace that matter. We therefore hold that the court erred in refusing to give the instruction, for which the judgment must be reversed.

We are also asked to reverse the judgment because of the insufficiency of the evidence to establish appellant's freedom from contributory negligence. ⁵⁸² We refrain from commenting on the evidence, lest it might have the effect to prejudice the plaintiff's case before another jury, as a new trial must be had. We content ourselves by calling attention of the trial court to the admonition contained in *Lake Erie etc. R. R. Co. v. Stick*, 143 Ind. 449, which was designed as much for the instruction of trial judges generally in the state as it was the learned judge presiding in the trial of that particular case. Injustice is often done unintentionally by the trial judge shrinking from the responsibility cast upon him by the law of granting a new trial where the evidence fails to support the verdict. The injustice resulting from a failure to courageously meet and discharge that responsibility in many instances cannot be rectified by this court.

For the error in refusing the seventeenth instruction asked for by the appellant, the trial court should have granted appellant's

motion for a new trial. For that error the judgment is reversed, and the cause remanded, with instructions to sustain the defendant's motion for a new trial, and for further proceedings not inconsistent with this opinion.

PLEADINGS—WHEN MAY BE STRICKEN OUT AS SHAM.—A sham answer is one good in form, but false in fact, not pleaded in good faith, and which sets up new matter in defense which is false: *Piercy v. Sabin*, 10 Cal. 22; 70 Am. Dec. 692. A sham answer may be stricken out though verified: *Hayward v. Grant*, 13 Minn. 165; 97 Am. Dec. 228. But if there is conflicting evidence regarding the truth of a defense, it cannot be stricken out; for a trial before the court upon affidavits cannot be substituted for a jury trial in the ordinary mode: *Patrick v. McManus*, 14 Colo. 65; 20 Am. St. Rep. 253. See monographic note to *People v. McCumber*, 72 Am. Dec. 521-526.

RAILROADS — PERSON INJURED AT CROSSING — BURDEN OF PROOF AS TO CONTRIBUTORY NEGLIGENCE.—A railroad track is of itself a warning of danger: *Vincent v. Morgans etc. R. R. etc. Co.*, 48 La. Ann. 933; 55 Am. St. Rep. 287, and note. A traveler must look and listen before going upon a railroad track: *Hinkle v. Richmond etc. R. R. Co.*, 109 N. C. 472; 26 Am. St. Rep. 581, and note. This is a clear and certain rule of duty, and a departure from it is negligence per se: *Greenwood v. Philadelphia etc. R. R. Co.*, 124 Pa. St. 572; 10 Am. St. Rep. 614. One cannot recover for an injury which might have been avoided if he had used his faculties of sight and hearing: *Mynning v. Detroit etc. R. R. Co.*, 64 Mich. 93; 8 Am. St. Rep. 804. It is generally presumed that a person injured has exercised due care: *Huntress v. Boston etc. R. R.*, 66 N. H. 185; 49 Am. St. Rep. 600, and note; but where there is affirmative, direct, and creditable testimony to the contrary, the presumption is rebutted and displaced: *Mynning v. Detroit etc. R. R. Co.*, 64 Mich. 93; 8 Am. St. Rep. 804; *O'Connor v. Missouri Pac. Ry. Co.*, 94 Mo. 150; 4 Am. St. Rep. 364.

MAGEL v. MILLIGAN.

[150 INDIANA, 582.]

MARRIED WOMAN—ESTOPPEL TO DENY PURPOSE FOR WHICH MONEY WAS LOANED.—Where, for the purpose of inducing a loan, to be secured by a mortgage on land held by a husband and wife by the entirety, they make an affidavit to the effect that the moneys to be borrowed are to be used in part to pay off an encumbrance on such land, and the balance to purchase other lands, to be held by them in the same manner, she is estopped, in an action to foreclose the mortgage, from insisting that the moneys were borrowed for the use of her husband, and that no part thereof had been received by her or used in the improvement of her separate estate, where the lender of the money relied upon her affidavit and had no notice that any of the statements thereof was untrue.

APPELLATE PROCEDURE.—IF A JOINT ASSIGNMENT OF ERROR is made by a husband and wife, it will be held good as to both if good as to the wife.

ESTATES OF DECEDENTS.—WHERE AN ACTION IS BROUGHT BY HEIRS to recover a debt due their ancestor, they must allege and prove that the debts of the ancestor have been paid,

or the estate settled, or that no letters of administration have been granted.

HUSBAND AND WIFE HOLDING BY THE ENTIRETIES—MORTGAGES GIVEN BY.—There is a presumption, where lands are held by the entireties, and the joint note and mortgage of the husband and wife are given to secure a loan, that they are principals and equally responsible, and satisfactory evidence should be given in favor of the wife where she claims to be a surety only.

F. E. Gavin, C. F. Coffin and T. P. Davis, for the appellants.

William T. Brown, for the appellees.

⁵⁸³ **HOWARD, J.** This was an action on promissory notes, and to foreclose mortgages securing the same. The notes and mortgages were executed by appellants, husband and wife, in favor of Joseph Milligan, deceased; and the action was brought by appellees as the only heirs at law of the said Joseph Milligan.

The appellant Louisa Magel filed her separate answer to the complaint, in which she averred that at the time of the execution of the notes and mortgages she was, and ever since has continued to be the wife of Henry Magel, her coappellant; that the money received for said notes and mortgages was received by her said husband; that none of it was ever received by her, or used in the improvement of her separate estate; and that she signed the notes and mortgages simply and solely to enable her husband to procure a loan for his own use and benefit.

To this answer the appellees replied, admitting that appellants were at the date of the notes and mortgages, and still are, husband and wife, and that the land mortgaged was then and still is held by them as tenants by entireties. But, it is further said in the reply ⁵⁸⁴ the notes and mortgages were executed by appellants for a loan then made to them by Joseph Milligan. And the reply continues, that before said loan was made or said notes and mortgages executed, the appellants, "for the purpose of showing and convincing said Joseph Milligan, and those acting for him in the matter, for what purpose said debt was made and said notes and mortgages given, and the use that was to be made of the money to be obtained upon said loan," signed and made oath to a written statement, set out in the reply. In this affidavit it was stated that the appellants were the owners in fee simple by entireties of the lands on which the mortgages were to be given; that the money to be borrowed was to be used in part to pay off an encumbrance then upon the land, and the balance to purchase other land, also to be held by entireties; that Louisa Magel presented said affidavit to Joseph Milligan and to those acting for him in the matter, "intending that they should rely upon said

statement, and should act thereon in making said loan. And said Joseph Milligan and those acting for him did believe the said statement to be true, and did in good faith, rely upon the same, and did make said loan so believing said statement and so relying on the truth of the same. If said Joseph Milligan or those acting for him had known that said statements were false, and that said loan was, as alleged in the said answer, made for the sole use of the defendant, Henry Magel, said loan would not have been made, nor would said loan have been made if said representations had not been made. And plaintiffs say that the proceeds of said loan were applied first to the payment of the mortgage debt set out and mentioned in said affidavit, which was a valid and subsisting lien upon the real estate described in the complaint, and the residue was paid and given ⁵⁸⁵ to both of the defendants by a check upon a bank, payable to the order of both defendants."

Upon the issues so formed, the court found for the appellees, that the mortgages securing the notes given for the loans were valid liens upon the lands of appellants, and should be foreclosed. Over a motion for a new trial, made by Louisa Magel, judgment was rendered in favor of appellees.

Both appellants unite in assigning as error that the court overruled Louisa Magel's motion for a new trial. There is some discussion as to whether the assignment so made is joint or several as to the parties appellant. But in this case the question is not material. Henry Magel did not make any motion for a new trial, and took no exceptions to any ruling of the court in regard to such motion. Ordinarily, therefore, an assignment of error made by him that the court overruled a motion for a new trial would not be available; and, under the general rule that a joint assignment of error must be good as to all who unite in it, the assignment here, being bad as to Henry Magel, would be bad also as to his coappellant, Louisa Magel. But there is an anomalous exception to the general rule here stated, a remnant of old procedure resulting from the former legal relations of husband and wife; and, according to this exception, it is held that where husband and wife are parties an assignment will be good as to both if it is good as to the wife: Elliott's Appellate Procedure, sec. 319; Stewart v. Babbs, 120 Ind. 568; Sibert v. Copeland, 146 Ind. 387. The fact that Henry Magel joined in the assignment made by his wife did not, therefore, make the assignment bad.

Where, as in this case, an action is brought by heirs to recover a debt due an ancestor, it is necessary to allege and prove that the

debts of the ancestor have been paid, and the estate settled, or that no letters of ⁵⁸⁶ administration have been granted: *Finnegan v. Finnegan*, 125 Ind. 262. The reason for this rule is a very sound one. So long as there is an administrator, he is entitled to recover all debts due the estate; besides, the heirs can have no right to sue for and recover debts due the estate when such amounts may be needed to make payment to the creditors of the estate. The claims of creditors are paramount to the rights of heirs.

It is admitted by appellants that the allegations of the complaint in this respect were sufficient; but they contend that there was not sufficient evidence to show that Joseph Milligan's estate had been settled. It was admitted on the trial that Joseph Milligan died intestate, that prior to the commencement of the action "all the debts of his estate had been paid and settled up," and that the appellees are his only surviving heirs. This admission alone would not perhaps have been sufficient to show that the estate had been settled, and that there was no administrator. We think, however, that there was enough other evidence heard by the court to authorize the finding that the estate had been settled. The appellees were in possession of the notes and mortgages, and this was at least *prima facie* evidence of title in them: 2 Parson on Notes and Bills, 444; *Casto v. Evinger*, 17 Ind. App. 298. Sufficient inferences, as we think, could be drawn from the evidence in the record to support the allegation made in the complaint that the estate had been settled. There was nothing shown to the contrary.

The chief contention made by appellants is, that the evidence does not support the finding of the court. A careful reading of the record has, however, satisfied us that, notwithstanding the conflict in the evidence, the court had ample support for the finding made. The affidavit filed by appellants when the loan was made ⁵⁸⁷ was explicit as to the use to be made of the money, and would seem to have fully justified Joseph Milligan in relying upon the representations then made to him that the money was to be used, not for the husband, but for the benefit of the wife's estate. This affidavit was presented by the wife herself, and the evidence showed that she understood the contents of the affidavit at the time she swore to its truth. A part of the money was certainly used to pay a lien upon the land, for which the wife was jointly liable with her husband; and the remainder was paid, not to the husband, but to the husband and wife, by check to their joint order; and it was shown that she and her husband both in-

dorsed these checks before the money was drawn from the bank. If money cannot be safely loaned to a husband and wife after the taking of such precautions, it would seem that it could not be loaned at all. The parties should be estopped from now denying the consequences of their own words and acts: *Rodgers v. Union Cent. Life Ins. Co.*, 111 Ind. 343; 60 Am. Rep. 701; *Wertz v. Jones*, 134 Ind. 475; *Trimble v. State*, 145 Ind. 154; 57 Am. St. Rep. 163.

Even if it were true that the husband and wife had a secret understanding with one another that the money to be borrowed was not to be used as agreed to in the affidavit filed by them, and even if the money were actually used by the husband in violation of such sworn affidavits; yet, unless the wife were shown to be totally ignorant of the nature of the proceedings, no benefit ought to accrue to her from such deception; nor ought such fraud on the part of husband and wife avail to make it unlawful for one to loan them his money, relying, as the decedent here did, upon their false representations. Husband and wife should not be suffered to take advantage of their own wrong in so concealing their real design, unless, indeed, the ⁵⁸⁸ money lender himself had knowledge of the true state of the facts, and so participated in the violation of the law, which we do not think is here shown: *Cummings v. Martin*, 128 Ind. 20.

It may be added that a difference has been recognized between a case such as this, where husband and wife own their lands by entireties, and a case where one or both are the owners of separate interests: *Security Co. v. Arbuckle*, 119 Ind. 69. If the property is held by entireties, there may be some presumption indulged that the owners are, as they seem to be, equally interested and equally responsible, and that when they give their joint note and mortgage they are joint principals; and, in the face of such presumption, there should be some satisfactory proof to show that the wife is only surety, if such should be the fact: *Miller v. Shields*, 124 Ind. 166. Here the only such evidence offered amounts to little more than a claim that husband and wife joined in a scheme to deceive the money lender. It has often been held that the beneficent statute framed to protect the wife and family and home ought not to be perverted into a cloak for fraud: *McCoy v. Barns*, 136 Ind. 378.

Judgment affirmed.

MARRIED WOMEN—ESTOPPEL.—A married woman is generally estopped by a mortgage to which she is a party. She is estopped from denying her positive representations made to a mort-

gagee, who, acting in good faith, and without notice, is thus induced to take a mortgage on her lands: See monographic note to Trimble v. State, 57 Am. St. Rep. 172-175, on estoppel against married women; Temples v. Equitable Mortgage Co., 100 Ga. 503; 62 Am. St. Rep. 326, and note. If a husband and wife execute their joint note apparently as makers and without disclosing any suretyship, she cannot assert the defense of suretyship as against any person acquiring the note before maturity without notice that she was not a principal: Strickland v. Vance, 99 Ga. 531; 59 Am. St. Rep. 241.

DESCENT—ACTIONS BY HEIRS.—Heirs cannot, generally, sue in their own right for property of their ancestor's estate; but to this rule there are exceptions as when there is no administrator or executor, and no debts against the estate, or when the administration has been closed: Giddings v. Steele, 28 Tex. 733; 91 Am. Dec. 336. They may sue for whatever remains of an estate after it has been fully administered, and its liabilities to creditors have been extinguished; Easterling v. Blythe, 7 Tex. 210; 56 Am. Dec. 45, and note. Or they may sue without administration being granted on the estate of the testator, where a great length of time has elapsed between the time of the death and the time when action was brought: Buford v. Holliman, 10 Tex. 560; 60 Am. Dec. 223. See extended note to Hubbard v. Ricart, 23 Am. Dec. 200-203.

MOZINGO v. ROSS.

[150 INDIANA, 688.]

PRINCIPAL AND SURETY—STATUTE OF LIMITATIONS.

A partial payment of a debt by the principal does not suspend the running of the statute of limitations in favor of the surety.

PRINCIPAL AND SURETY—STATUTE OF LIMITATIONS.

—THE ABSENCE FROM THE STATE of the principal debtor does not suspend the running of the statute of limitations in favor of his surety.

James H. Fippen and James M. Purvis, for the appellant.

Fertig & Alexander, for the appellees.

688 JORDAN, J. This action was commenced by appellant on March 2, 1897, to recover a judgment on a promissory note, and also to set aside an alleged fraudulent conveyance of land by the appellee, Moses M. Ross, to his coappellee, Martha Price, and to subject the lands so conveyed to the payment of the judgment sought to be recovered upon the note.

The note in suit appears to have been executed on December 20, 1882, by one Francis M. Ross, together with the appellee, Moses M. Ross, to appellant, for the sum of one hundred and fifty dollars, due in twelve months after the date thereof. The following partial payments seem to have been made on the note, and indorsed thereon, as shown by a copy filed as an exhibit with the complaint, to wit: September 26, 1883, twelve dollars; January 6, 1887, twenty dollars, as interest; December 24, 1887, fif-

teen dollars; November 27, 1889, fifty-seven dollars and fifty-seven cents; December 13, 1889, twenty dollars.

Among other defenses interposed by the appellee, Moses M. Ross, under his separate answer, against a recovery upon the note, was the statute of limitations of ten years. Appellant replied to this answer in ⁶⁸⁹ three paragraphs, but subsequently dismissed the first and second. The third paragraph of the reply, in avoidance of the defense of the statute of limitations set up by the appellee, Moses M. Ross, averred that said Ross had executed the note in suit as the surety for one Francis M. Ross, and alleged the truth to be that said Francis M., the principal, had made the various partial payments on the note, as set out in the exhibit filed with the complaint, and that long before ten years had elapsed after the execution of the note, to wit, within six years after its execution, said principal, Francis M., with the knowledge and consent of the defendant, Moses M. Ross, his surety, but without the knowledge or consent of the plaintiff, removed from the state of Indiana, and became a non-resident of said state, and has so remained and continued to be a nonresident up to the present time, and, by reason of his being such nonresident, it is alleged that the plaintiff could not proceed against him, as the principal, for a judgment on the note. A demurrer was sustained to this paragraph, and, appellant refusing to plead further, judgment was rendered that she take nothing by her action, and that the defendants recover of her their cost.

The sustaining of the demurrer to the third paragraph of reply is the only error assigned. Appellant insists that the facts alleged in the reply were sufficient to avoid the defense of the statute of limitations set up in the answer. The questions presented for decision are: 1. Will a partial payment by a principal debtor suspend the running of the statute of limitations in favor of his surety? 2. Will the absence of the principal debtor from the state suspend the statute in favor of such surety?

Passing the consideration of the infirmities that are ⁶⁹⁰ urged against the pleading in controversy, to the effect that it pleads evidence instead of facts, and that it is deficient in not setting out the partial payments made, instead of referring to them only, as shown by the exhibit filed with the complaint, we proceed to determine the real questions discussed by the counsel of both parties to this appeal.

Section 302 of Burns' Revised Statutes of 1894 (Rev. Stats. 1881, sec. 301), relative to the statute of limitation, provides:

"No acknowledgment or promise shall be evidence of a new or continuing contract, whereby to take the case out of the operation of the provisions of this act, unless the same be contained in some writing signed by the party to be charged thereby." Section 303 of Burns' Revised Statutes of 1894 (Rev. Stats. 1881, sec. 302), provides: "The acknowledgment or promise of one joint contractor or executor or administrator, shall not render any other joint contractor, executor, or administrator liable under the provisions of this act." The next section, 304, declares that: "Nothing contained in the preceding sections shall take away or lessen the effect of any payment made by any person," et cetera. It is the settled rule that an admission of continued indebtedness may be inferred from the fact of part payment by a debtor. Such inference, however, is not one of law, but of fact. The payment is only prima facie evidence of the acknowledgment or admission of the debtor, and is subject to be rebutted by other evidence and the circumstances under which it was made: *Carlisle v. Morris*, 8 Ind. 421; *Willey v. State*, 105 Ind. 453.

The statute, as we have seen, declares that no acknowledgment or promise shall be evidence of a continuing contract to take the case out of the operation of the statute unless it be in writing signed by the party to be charged thereby. It is further provided that the promise or acknowledgment of a joint contractor ⁶⁹¹ shall not have the effect to render any other joint contractor liable. It is expressly declared, however, that these provisions of the law shall not take away or lessen the effect of any payment made by any person; consequently, they leave the effect of a partial payment untouched. The rule applicable to a payment, in taking a case out of the provisions of the statute of limitations, or rather, extending the time during which the action may be commenced, does not depend on any provisions of the statute of limitations, but is the result of judicial decisions, and the reason of the rule depends wholly upon such decisions. The reason upon which the rule is said to rest is, that a partial payment, voluntarily made by a debtor, upon a claim or debt, is in the nature of an acknowledgment or admission by him of his liability for the whole demand, and, from the fact that he made the payment, a new promise on his part to pay the remainder of the debt may be implied, and, under this legal inference, such new promise arises at the time the partial payment is made. The origin of the rule is fully considered and set forth in *Van Keuran v. Parmelee*, 2 N. Y. 523; 51 Am. Dec. 322. It must be

evident, we think, that, to bring the case within the reason of the rule, the payment should be made by the party to be charged with its effect, or by his agent duly authorized so to charge him. A partial payment, being treated by the law as nothing more than prima facie evidence of an admission or acknowledgment that the debt is due, it would seem, in reason, that it could and should only affect the party that makes it, unless he has authority to speak for others as well as himself. This doctrine finds support in the well-affirmed rule that the acknowledgment of a debt made by one partner after the dissolution of a partnership is not sufficient to take the case out of the operation of the statute of ⁶⁹² limitations as to the other partners: *Yandes v. Lefavour*, 2 Blackf. 371; *Kirk v. Hiatt*, 2 Ind. 322.

In the case of *Bottles v. Miller*, 112 Ind. 584, it is held that a payment upon a promissory note by one joint and several maker will not defeat the operation of the statute of limitations as to any other maker, nor deprive the latter of his right to avail himself of the statute as a defense. While the question in that case does not appear to have been very fully considered, the decision thereof seemingly being controlled by the construction which the learned judge, speaking for the court, placed upon the statute of limitations, we are, however, satisfied, in view of the authorities, that the conclusion reached by the court upon the question in that appeal was correct.

The statute, as heretofore said, in effect declaring that the acknowledgment or promise of one joint contractor will not take the case out of its operation as to any other joint contractor, no sufficient reason can be given, nor would any seem to exist, that would make a partial payment more potent in its effect than an express acknowledgment or promise by a debtor. Especially ought this to be true, in view of the fact that such payment is treated by the law as evidence only of a new promise to pay the remainder of the debt. We are of the opinion, and so hold, that the correct and better rule is, that a partial payment can serve only to suspend the running of the statute of limitations as against the party making the payment, by himself or duly authorized agent, and the fact that the one making the payment is the principal debtor does not alter nor change the rule as to other debtors who executed the note or obligation as his sureties.

We are aware that there are decisions of the higher courts of sister states which hold that the payment by one or more parties jointly and severally liable ⁶⁹³ upon a note or other obligation, made before the limitation attaches, will suspend the run-

ning of the statute in favor of the others, but the great trend of the decisions of courts of other states sustain the conclusion we have reached, among which are the following: *Van Keuran v. Parmalee*, 2 N. Y. 523; 51 Am. Dec. 322; *Shoemaker v. Benedict*, 11 N. Y. 176; 62 Am. Dec. 95; *Winchell v. Hicks*, 18 N. Y. 558; *McLaren v. McMartin*, 36 N. Y. 88; *Harper v. Fairley*, 53 N. Y. 442; *Graham v. Selover*, 59 Barb. 313; *Succession of Voorheis*, 21 La. Ann. 659; *Hunter v. Robertson*, 30 Ga. 479; *Smith v. Coon*, 22 La. Ann. 445; *Marienthal v. Mosler*, 16 Ohio St. 566; *Hance v. Hair*, 25 Ohio St. 349; *Steele v. Souder*, 20 Kan. 39; *Davis v. Clark*, 58 Kan. 454.

The absence from the state of the principal debtor in this case did not suspend the running of the statute in favor of the appellee, his surety: *Bottles v. Miller*, 112 Ind. 584; *Davis v. Clark*, 58 Kan. 454; 2 Wood on Limitations, sec. 246.

It follows that the court did not err in sustaining the demurrer to the reply, and the judgment is therefore affirmed.

LIMITATIONS OF ACTIONS—PART PAYMENT BY PRINCIPAL AS AFFECTING SURETY.—Partial payments made by a principal without the knowledge of the surety do not operate to keep the obligation alive as to the surety: *Meltzler v. Todd*, 12 Ind. App. 381; 54 Am. St. Rep. 531, and note. Contra, *Hunt v. Bridgham*, 2 Pick. 581; 13 Am. Dec. 458. The payment by the principal, year by year, of the interest on a joint and several promissory note, will prevent the operation of the statute of limitations in favor of a surety on the note: *Schindel v. Gates*, 46 Md. 604; 24 Am. Rep. 526. See *Eising v. Andrews*, 66 Conn. 58; 50 Am. St. Rep. 75; monographic note to *Leeds Lumber Co. v. Haworth*, 60 Am. St. Rep. 207.

CASES
IN THE
APPELLATE COURT
OF
INDIANA.

METROPOLITAN LIFE INSURANCE CO. v. McCORMICK.

[19 INDIANA APPEALS, 49.]

APPEAL—TESTING COMPLAINT FOR THE FIRST TIME ON.—The question as to the sufficiency of a complaint, which omits the statement of a material fact essential to a right of recovery, may be raised for the first time on appeal.

INSURANCE—WRONGFUL CANCELLATION OF LIFE POLICY—REMEDY WHERE RISK HAS ATTACHED.—If a policy of life insurance has been wrongfully canceled by the insurer, the insured may obtain a reinstatement thereof, or maintain an action for damages, but he cannot maintain an action for the premiums paid where the risk has attached and the company has assumed liability in case of loss.

INSURANCE—WRONGFUL CANCELLATION OF LIFE POLICY—REMEDY WHERE RISK HAS NOT ATTACHED.—If a policy of life insurance has been wrongfully canceled by the insurer, and the risk has not attached, all the premiums must be returned, and an action will lie for their recovery.

INSURANCE—WRONGFUL CANCELLATION OF LIFE POLICY—REMEDY WHERE RISK HAS ATTACHED.—If a policy of life insurance has been duly issued, and is wrongfully cancelled by the insurer, after the risk has attached, the insurer may sue for damages and recover the present cash surrender value of the policy, or he may tender the premiums as they become due, and recover the full amount of the policy on the death of the insured, or he may proceed in equity, and have a decree sustaining and declaring valid the contract of insurance.

James A. Pritchard and Chambers, Pickens & Moores, for the appellant.

G. A. Henry, for the appellee.

WILEY, J. Appellee sued appellant to recover premiums paid on numerous life insurance policies issued to appellee by appellant upon his life, and the lives of members of his family. The complaint avers that, beginning in 1891, and up to and including May 22, 1893, appellant issued to appellee eight sep-

arate policies, the premiums upon which were payable weekly; that he paid said premiums as they became due, up to July 20, 1895, and paid in all two hundred dollars; that on the said 20th of July, 1895, there was due upon all of said policies as premiums, the sum of ninety-nine cents, which said sum was duly tendered to appellant, through its proper officer, at its office in Indianapolis, Indiana, but that appellant refused to accept and credit the same, and has ever since refused, wrongfully and without cause, to receive from appellee the premiums due on said policies, and declared said policies void, and has lapsed and canceled the same. It is further averred that appellant still illegally and wrongfully withholds from appellee the amount so paid by him as premiums upon said policies; that demand has been made upon appellant for the return of all of said premium, and that it has refused to pay the same; and that by reason of the illegal and wrongful forfeiture and cancellation of said policies appellant became, and still is, indebted to appellee in the sum of two hundred dollars, as and for money had and received for the use of the appellee, to his damage, et cetera. The issues were joined by general denial. Trial by the court resulted in a judgment for appellee in the sum of one hundred and ninety-seven dollars and seventy-one cents.

In the court below the sufficiency of the complaint was not challenged by a demurrer, but it is called in question for the first time on appeal, by the assignment of error that it does not state facts sufficient to constitute a cause of action. It is insisted with great earnestness that the complaint omits the averment of ⁵¹ a material and necessary fact, essential to the existence of the cause of action attempted to be stated, and that for such omission the complaint is bad, and may be attacked for the first time in the appellate tribunal. The sufficiency of the complaint was not challenged below by a demurrer, but the rule is well settled in this state that, if the complaint omits to state a material fact essential to plaintiff's right of recovery, the question may be raised for the first time on appeal: *Smith v. Smith*, 106 Ind. 43; *Taylor v. Johnson*, 113 Ind. 164; *Burkhart v. Gladish*, 123 Ind. 337.

The material fact which appellant claims was necessary to aver, and essential to appellee's recovery, is that the complaint fails to allege any contract conferring upon appellee the right to recover the premiums paid by him, in full. It is clearly apparent, from the averments of the complaint, that, up to a certain date, appellee paid all premiums on his several policies as they

matured. On July 20, 1895, when he tendered another payment, and all that was then due, the same was refused, and his policies declared forfeited; and upon these facts he charges in his complaint a cancellation or forfeiture of valid, existing policies, and seeks to recover the full amount of premiums paid, without averring that his contract of insurance gave him this right. As to whether the policies contain a provision for the return of the premium, in case they are canceled, we are not advised, as a matter of fact, for they are not made parts of the complaint by exhibit, and there is no such averment in the complaint; but, in the absence of such averment and the policies, we must assume that they contain no such provision. Conceding that the fault, if any, of the cancellation of the policies, was appellant's, and that the appellee performed all the conditions of his several contracts, the question presents ⁵² itself, Has he sought his proper remedy? It seems to us that this inquiry must be answered in the negative. Here appellee seeks to recover all the money paid as premiums while the policies, as he avers, were valid and in full force. If his policies were wrongfully canceled, then, in law, they are still in force, and he could require them, by proper proceedings, to be reinstated, or he could bring an action for damages; and in such case his measure of damages would be the cash surrender value of his policies. If appellee can recover, upon the theory of his complaint, on what he avers were valid policies, then appellant would be required to carry the several risks, from the time the several policies were issued up to the time of their alleged wrongful cancellation, without compensation. The several policies were issued upon the life of appellee and members of his family. If death had intervened at any time prior to their alleged cancellation, appellant would have been liable, provided appellee had performed all of the conditions of the several contracts on his part. By the issuing of the policies and the payment of the premiums, appellant assumed the risks therein provided against. In other words, the risks had attached, and appellant had assumed them.

There seems to be a well-defined distinction between cases where the risk has attached and where it has not attached. In the latter case, all the premiums must be returned, and an action will lie for their recovery: *Hawke v. Niagara District etc. Ins. Co.*, 23 Grant U. C. 139; *Jones v. Insurance Co.*, 90 Tenn. 604; 25 Am. St. Rep. 706; *Joliffe v. Madison etc. Ins. Co.*, 39 Wis. 111, 117; 20 Am. Rep. 35; *Phenix Ins. Co. v. Tomlinson*, 125 Ind. 84; 21 Am. St. Rep. 203; *Tyrie v. Fletcher*, Cowp. 668;

Stevenson v. Snow, 3 Burr. 1237; Waters v. Allen, 5 Hill, 421; ⁵³ Clark v. Manufacturers' Ins. Co., 2 Wood. & M. 472; Anderson v. Thornton, 8 Ex. 425. This rule is certainly grounded in sound reason. In such case, the insurance company has not incurred any risk, and hence is not entitled to any compensation. But where the risk has attached, and the company has assumed liability in case of loss, the rule must be different. It cannot be presumed that an insurance company can assume liability upon one of its policies, and, after carrying the risk for a certain period, be required to refund all the premiums paid while, as in this case, as charged, the policies were in full force and valid, and the company refused to accept the payment of another premium when due, and canceled it. In each of the policies issued to appellee by appellant, premiums were paid, and the risks attached. In Waters v. Allen, 5 Hill, 421, it was held that there could be no return of the premium where the policy attached, though only for a single moment. Mr. Bliss says: "Where the policy has been void ab initio, or in any case 'where a premium has been paid, but the risk has not been run, whether this has been owing to the fault, pleasure, or will of the assured, or to any other cause, the premium shall be returned by the insurers, but, if the risk has once commenced, there shall be no apportionment or return of the premiums afterward.'" Quoting Lord Mansfield in Tyrie v. Fletcher, Cowp. 668, and Bliss on Life Insurance, second edition, section 415, page 750, Mr. May says: "If a policy be void ab initio, or if the risk never attaches, and there is no actual fraud on the part of the insured, and the contract is not against law or good morals, . . . he may recover back all the premiums he may have paid. . . . But if the risk once attaches the premium is not apportionable": May on Insurance, sec. 567. In Clark v. Manufacturers' Ins. Co., ⁵⁴ 2 Wood. & M. 472, 493, the court said: "If it [the policy] once attaches, the premium is not to be restored, however short the time. . . . Certainly not the whole of the premium, and none unless it can be properly divided, and a part of the risk, as in some sea usages, can be considered as never having been incurred." In Phenix Ins. Co. v. Tomlinson, 125 Ind. 84, 21 Am. St. Rep. 203, the court by Elliott, J., said: "The moment the risk attached the premium paid was beyond recovery by the insured. . . . His right is correspondent to his burden; he cannot get his money back, but he can enforce his contract."

The complaint avers that "the said defendant still illegally and wrongfully retains and withholds from this plaintiff the

aforesaid sum of money paid by him to said defendant as premiums upon said policies of insurance. And demand has been made by the plaintiff for the return to him of all of said premiums by it collected from said plaintiff, yet said defendant refuses and neglects to repay the same." From the whole complaint it is evident that the theory upon which it is drawn is for the recovery of money paid by appellee to appellant as premiums upon certain insurance policies.

In *Continental Life Ins. Co. v. Houser*, 111 Ind. 266, which was a second appeal, the court said: "There is no evidence in the record of this cause, as now presented, which proves, or tends to prove, that appellant ever had and received any money, for the use and benefit of appellee, upon any account other than premiums paid upon a valid risk assumed by appellant upon the life of Louise Hesse. Under the law of this case, as declared by this court on the former appeal herein, such premiums so paid cannot be recovered back from the appellant as for money had and received."

⁵⁵ In *Continental Life Ins. Co. v. Houser*, 89 Ind. 258, the action was very similar to the one in hand. There an action was brought to recover the premiums paid on a policy of life insurance. The appellee had paid the annual premium for a certain number of years, and when another annual premium became due, appellee went to pay it to appellant's agent at Terre Haute, but was unable to find anyone authorized to receive the money, and, on failure to pay, the policy was declared forfeited. The court, by Elliott, J., said: "It is not easy to determine upon what theory the paragraph [fourth paragraph of complaint] is constructed, but counsel on both sides treat it as a complaint for the recovery of the premiums paid by the appellee. We do not think the paragraph good for any purpose or upon any theory.

"There is no averment of performance of the conditions of the contract on the part of the assured; nor, indeed, is there any statement of the terms or conditions of the contract. For anything that appears, the appellant may have had an undoubted right to forfeit the policy. . . . Where a plaintiff grounds a right of action upon a breach of such a contract, he must show performance on his part and a wrongful refusal or failure to perform on the part of his adversary. It is not enough to show nonperformance, for there may be nonperformance without a breach. In order to make a good complaint in such an action as this, the plaintiff must show the terms and conditions of the

contract, performance on his part, and a failure or refusal to perform on the part of the other party, constituting a breach of the contract. There is nothing in the complaint before us showing that the refusal to perform was not fully justified by the terms of the policy.

"The policy was valid in its inception, and there ⁵⁶ was for a time a risk, and the general rule is, that where the risk attaches premiums cannot be recovered from the company: *Bliss on Life Insurance*, 750; *May on Insurance*, 567. If there was a continuing valid risk up to the time the last premium was tendered and refused, then the premiums previously paid cannot be recovered: *May on Insurance*, secs. 568, 569. If, however, the act of the appellant in declaring a forfeiture was wrongful, then there must be a remedy. We do not feel called upon to decide whether the remedy would be a reinstatement of the policy or an action for its value, for the complaint is insufficient in any view that may be taken of the question."

In line with the case from which we have just quoted is *Day v. Connecticut etc. Ins. Co.*, 45 Conn. 480; 29 Am. Rep. 693. In *Continental Life Ins. Co. v. Houser*, 89 Ind. 260, the court suggests, but does not assume to decide, that the appellee might have had some other remedy. That the appellee in this case has a remedy, if he has been wronged by appellant's acts, and he has performed all the conditions of the contract of insurance on his part, there can be no doubt.

Where a life policy has been duly issued, and is wrongfully canceled by the insurer, the insured may sue and recover for the present value of the policy, or he may tender the premiums as they become due, and recover the full amount of the policy on the death of the insured, or he may proceed in equity, and have a decree sustaining and declaring valid the contract of insurance: *Day v. Connecticut etc. Ins. Co.*, 45 Conn. 480; 29 Am. Rep. 693; *Brooklyn etc. Ins. Co. v. Weck*, 9 Ill. App. 358; *Clemmitt v. New York Life Ins. Co.*, 76 Va. 355.

In *Standley v. Northwestern etc. Ins. Co.*, 95 Ind. 254, the court said: "If a policy is valid in its inception, then the company cannot be required to refund the premiums received, although it may subsequently ⁵⁷ wrongfully attempt to declare a forfeiture." We might cite numerous other cases from many of the states, in harmony with the rule above announced, but it seems useless to do so. We do not lose sight of the fact that in some of the states a different rule prevails, but the great weight of the authorities are in consonance with the cases above cited.

Here there is no averment that appellee performed all of the conditions of the several policies issued to him by appellant. The complaint avers that said policies provided for certain premiums to be paid weekly, and this is the only condition which he says he performed. There may have been, and doubtless were, numerous conditions to be performed by him. As was said in *Continental Life Ins. Co. v. Houser*, 111 Ind. 266, to make his complaint good it was necessary for him to aver the terms and conditions of his contract, that he performed all of the terms on his part, and that appellant failed or refused to perform all the conditions on its part, such failure or refusal constituting a breach of the contracts.

The complaint, in our judgment, does not state facts sufficient to constitute a cause of action. The record presents, and counsel have argued, other questions; but as the complaint does not state a cause of action, it is unnecessary for us to consider them.

Judgment reversed.

APPEAL—NO CAUSE OF ACTION.—The question whether a petition states facts sufficient to constitute a cause of action is never waived, and may be first raised in the appellate court: *Tate v. Bates*, 118 N. C. 287; 54 Am. St. Rep. 719, 724.

INSURANCE — LIFE — REMEDIES WHERE INSURER REFUSES TO RECEIVE PREMIUMS.—If a life insurance company wrongfully refuses to accept a premium and determines the policy, the insured may treat the policy as determined, and recover all the premiums he has paid: *McCall v. Phoenix Mut. Life Ins. Co.*, 9 W. Va. 237; 27 Am. Rep. 558. Compare *Day v. Connecticut etc. Ins. Co.*, 45 Conn. 480; 29 Am. Rep. 693.

TRACY v. HACKET.

[19 INDIANA APPEALS, 183.]

LIBEL—LANGUAGE LIBELOUS PER SE—DAMAGES—PRESUMPTION.—If defamatory language is libelous per se, the law presumes general damages as a natural and probable consequence.

LIBEL—EXEMPLARY DAMAGES cannot be allowed in a civil action for libel where the wrong is of such a nature that the defendant would be liable to a criminal prosecution therefor. Compensatory damages only are allowable in such a case.

LIBEL — EVIDENCE — PLAINTIFF'S CHARACTER.—The defendant may, under the general denial in a civil action for libel, prove, in mitigation of damages, that the plaintiff's general character is bad.

LIBEL.—THE AMOUNT OF DAMAGES, in a civil action for libel, is peculiarly within the province of the jury.

LIBEL—CHARGE OF FELONY.—DAMAGES may be recovered in a civil action for libel, which contains a charge of felony, without any allegation of special damages.

LIBEL—REVERSAL OF JUDGMENT FOR FAILURE TO ASSESS NOMINAL DAMAGES.—Although the plaintiff, in a civil action for libel, is entitled to a verdict for nominal damages for an invasion of his legal right by a defamatory publication, imputing a crime to him, and which has not been justified, yet a failure of the jury to award him nominal damages is not sufficient ground for reversing a judgment for the defendant, as the case is not one in which a permanent right is affected.

INSTRUCTIONS—WHEN FAILURE TO GIVE, IS NOT REVERSIBLE ERROR.—If there is no reversible error in the instructions given, there can be no reversal for a failure to give additional instructions not requested.

William H. Shambaugh and Henry C. Hanna, for the appellant.

Henry Colerick, J. E. K. France, and Will E. Colerick, for the appellee.

¹³⁴ **BLACK, J.** The appellant brought his action against the appellee for libel, the complaint showing a publication of libelous language imputing a crime to the appellant, in a newspaper of which the appellee was alleged to be the owner and publisher, whereby the appellant "was injured in his reputation, to his damage in the sum of," et cetera. There was an answer of general denial, and there were a number of special paragraphs, but there was no answer seeking to justify by alleging the truth of the language published. A jury returned a verdict for the appellee. The appellant's motion for a new trial was overruled. It is claimed in argument for the appellant that, as was assigned in the motion for a new trial, the verdict was not sustained by sufficient evidence, and that it was contrary to law.

Counsel for appellant present as the question for decision under these assigned causes for a new trial, whether or not the plaintiff in such a case, when the libelous matter published contains a charge of felony, is entitled to nominal damages, when the defendant fails to justify by establishing the truth of the charge contained in the libelous publication. No special ¹³⁵ damages were alleged, and it was not necessary to a recovery to show special damages. The defamatory language was libelous per se; and for words actionable per se the law presumes general damages as natural and probable consequences. The wrong here involved in suit being one for which the wrongdoer would be liable both to a criminal prosecution and to a civil action, it is settled in this state that exemplary damages could not be assessed, and that the appellant would be entitled only to compensatory damages: *Wabash etc. Co. v. Cumrine*, 123 Ind. 89, and cases there cited.

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Counsel for appellant present as the question for decision under these assigned causes for a new trial, whether or not the plaintiff in such a case, when the libelous matter published contains a charge of felony, is entitled to nominal damages, when the defendant fails to justify by establishing the truth of the charge contained in the libelous publication. No special **135** damages were alleged, and it was not necessary to a recovery to show special damages. The defamatory language was libelous per se; and for words actionable per se the law presumes general damages as natural and probable consequences. The wrong here involved in suit being one for which the wrongdoer would be liable both to a criminal prosecution and to a civil action, it is settled in this state that exemplary damages could not be assessed, and that the appellant would be entitled only to compensatory damages: *Wabash etc. Co. v. Cumrine*, 123 Ind. 89, and cases there cited.

Under the general denial, matter in mitigation was admissible in evidence, and the appellee might prove the appellant's general character to be bad, in mitigation of damages: *O'Conner v. O'Conner*, 27 Ind. 69; *Blickenstaff v. Perrin*, 27 Ind. 527; *Mossier v. Stoll*, 119 Ind. 244; *Burke v. Miller*, 6 Blackf. 155; *Hallowell v. Guntle*, 82 Ind. 554.

The amount of damages would be peculiarly within the province of the jury: See *Alley v. Neely*, 5 Blackf. 200; *Indianapolis Sun Co. v. Horrell*, 53 Ind. 527; *Dean v. Miller*, 66 Ind. 440; *Marks v. Jacobs*, 76 Ind. 216; 13 Am. & Eng. Ency. of Law, 432.

There is no claim on behalf of appellant that under the evidence, which we need not recount, he would be entitled to a reversal for failure to assess substantial damages, but it is insisted that for the invasion of his legal right by the defamatory publication which has not been justified he was entitled to a verdict for nominal damages.

Assuming this claim to be correct, it does not necessarily follow that the appellant is entitled to a reversal of the judgment on appeal. In *Crawford v. Bergen*, 91 Iowa, 675, it was held that a failure of the jury to award nominal damages in ¹³⁶ slander, where the plaintiff was only entitled to nominal damages, was not sufficient ground for reversing a judgment for the defendant.

In *Funk v. Evening Post Pub. Co.*, 76 Hun, 497, which was an action for libel, wherein the jury found for the defendant, notwithstanding an instruction of the court that the plaintiff was entitled to at least nominal damages, the court on appeal refused to reverse the judgment. It was held that unless some permanent right is affected, or some error of court has crept in, by which the jury has rendered an erroneous verdict, the court will not set aside the verdict upon appeal because the plaintiff was entitled to nominal damages.

In *Jennings v. Loring*, 5 Ind. 250, the action being for false imprisonment, where there was a technical right to recover, and the plaintiff was entitled to nominal damages, but to nothing more, it was held that the failure to assess nominal damages was not good ground for a new trial: See, also, *Tate v. Booe*, 9 Ind. 13; *Patton v. Hamilton*, 12 Ind. 256; *State v. Shackelford*, 15 Ind. 376; *Hudspeth v. Allen*, 26 Ind. 165; *Black v. Coan*, 48 Ind. 385; *State v. Cloud*, 94 Ind. 174; *Platter v. Seymour*, 86 Ind. 323; *Hacker v. Blake*, 17 Ind. 97; *Mahoney v. Robbins*, 49 Ind. 146; *Tipton v. Jones*, 77 Ind. 307; *Atkins v. Van Buren School Tp.*, 77 Ind. 447.

Under these authorities, we would not be authorized to reverse the judgment for the mere reason that the jury failed to assess nominal damages to which the appellant was entitled.

The case of Indianapolis etc. Gravel Road Co. v. Belt Ry. Co., 110 Ind. 5, to which we have been referred by counsel, is not in conflict with this conclusion. There the ground of the court's decision upon this point was thus expressed: "The injury to appellant ¹³⁷ is in its character permanent, and will be permanent, unless his rights are settled and established. Appellee is wrongfully maintaining the track of its railroad across appellant's gravel road. By lapse of sufficient time that maintenance will ripen into a right. For reasons stated, this is not a case for the application of the maxim, *De minimis non curat lex*."

The case before us is not one in which a permanent right is affected. The distinction is discussed and illustrated in *Funk v. Evening Post Pub. Co.*, 76 Hun, 497.

Some complaint is made in argument in relation to the instructions given to the jury. But upon a comparison of all the instructions, including those given at the request of the appellant, we cannot conclude that they were prejudicial to the appellant's rights. It may be that if we were called upon to decide, we would be of opinion that it would have been proper to instruct the jury upon the subject of nominal damages, but no such instruction was asked. There being no reversible error in the instructions given, we cannot reverse for failure to give additional instruction not requested.

The judgment is affirmed.

LIBEL—DAMAGES.—If one has been libeled, the law will presume that he has been injured, and leave the amount of such injury to the determination of the jury: See monographic note to *McAllister v. Detroit Free Press Co.*, 15 Am. St. Rep. 339, on newspaper libel; note to *Holmes v. Jones*, 49 Am. St. Rep. 651. The law implies malice and infers damages from a libelous publication; Note to *Holmes v. Jones*, 49 Am. St. Rep. 651. In an action for libel the amount of damages is peculiarly within the province of the jury, and may be either compensatory or punitive: *Holmes v. Jones*, 147 N. Y. 59; 49 Am. St. Rep. 646; though in a few of the states exemplary damages are not allowed in actions for slander or libel: Note to *McAllister v. Detroit Free Press Co.*, 15 Am. St. Rep. 341.

LIBEL—CHARGE OF CRIME—DAMAGES.—Vindictive damages are not recoverable for libel or other injury which is punishable by indictment: *Austin v. Wilson*, 4 Cush. 273; 50 Am. Dec. 766, and extended note thereto, on the allowance, in general, of exemplary damages. Words which impute guilt of crime punishable with imprisonment are libelous per se: *World Pub. Co. v. Mullen*, 43 Neb. 126; 47 Am. St. Rep. 737, and note; *Belo v. Fuller*, 84 Tex. 450; 31 Am. St. Rep. 75. The verdict of a jury, in a libel case, cannot be restricted to nominal damages unless they believe that such damages will compensate the plaintiff for the wrong suffered, and that exemplary

damages should not be given: Note to Buckstaff v. Hicks, 59 Am. St. Rep. 857.

LIBEL.—SPECIAL DAMAGES, when claimed in an action for libel, must be alleged and proved, as in any other case, where the words are not libelous per se: Mitchell v. Bradstreet Co., 116 Mo. 226; 38 Am. St. Rep. 592; but if the words are libelous per se, the declaration need not aver any special damage: Note to Hirshfield v. Fort Worth Nat. Bank, 29 Am. St. Rep. 668; and he may recover general damages without proof of special damage: Note to McAllister v. Detroit Free Press Co., 15 Am. St. Rep. 339.

LIBEL—EVIDENCE—PLAINTIFF'S CHARACTER.—In actions of libel or slander, the defendant may, under the general issue, introduce evidence as to the plaintiff's bad reputation in mitigation of damages: Note to Holmes v. Jones, 49 Am. St. Rep. 651; even though justification is pleaded: Note to Sickra v. Small, 47 Am. St. Rep. 348.

INSTRUCTIONS.—A FAILURE TO GIVE INSTRUCTIONS not asked is not error: Mitchell v. Bradstreet Co., 116 Mo. 226; 38 Am. St. Rep. 592, and note; McDonald v. International etc. Ry. Co., 86 Tex. 1; 40 Am. St. Rep. 803.

SHERIDAN GAS, OIL, AND COAL CO. v. PEARSON.

[19 INDIANA APPEALS, 252.]

ACTION—RIGHT OF, BY ONE IN POSSESSION, FOR INJURY TO PROPERTY.—One having the possession of property may maintain an action against a wrongdoer for an injury thereto, which cannot be defeated by showing the title to be in some one else than the plaintiff.

HUSBAND AND WIFE—TENANTS BY ENTIRETIES—ACTION FOR DAMAGES—PARTIES PLAINTIFF.—If a husband, engaged in business, is in possession of a storeroom and stock of general merchandise, which are injured by an explosion of natural gas, he may recover damages therefor without joining his wife in the action, whether the title to the real estate is in himself, or in himself and his wife, as tenants by entireties.

ABATEMENT, PLEA IN.—A DEFECT OF PARTIES PLAINTIFF can be urged only by a plea in abatement, where such defect is not apparent on the face of the complaint.

PARTIES PLAINTIFF—DEFECT—WAIVER OF OBJECTION.—An objection that there is a defect of parties plaintiff is deemed to have been waived where no plea in abatement was interposed.

Shirts & Kilbourne and Griffin, Griffin & Griffin, for the appellant.

Fertig & Alexander, and Gavin, Coffin & Davis, for the appellee.

252 COMSTOCK, J. This action was brought by appellee against appellant to recover damages to appellee's storeroom and goods therein, in the town of Sheridan, this state, occasioned by an explosion of natural gas.

The defendant (appellant) answered by general denial. There was a trial by jury and a special verdict returned. Upon this verdict on motion of appellee judgment was rendered for four hundred and thirty-six dollars. Appellant's motion for a new trial was overruled, and thereupon appellant moved to modify the judgment, which motion was overruled.

The errors assigned are: 1. Error in overruling demurrer to complaint; 2. Error in sustaining motion ²⁵³ for judgment in favor of appellee on special verdict; 3. Error in overruling motion for new trial; 4. Error in overruling motion to modify the judgment.

The only questions discussed under the assignments (and under the rules all other are waived), are: 1. "Can the husband alone maintain an action for damages to real estate held by him and his wife as tenants by entireties?" 2. "Did the court err in overruling the motion to modify the judgment?"

The action was to recover damages sustained by appellee, a merchant, engaged in a retail business, for injury done to the storeroom and stock of general merchandise therein owned by him.

In the course of the trial, it appeared from the evidence for the first time at the beginning of the cross-examination of plaintiff, that the title to the real estate was held by him and his wife as tenants by entireties. Thereupon appellant moved to strike out all the testimony of the plaintiff relating to damages to the woodwork and wallpaper on the building, the damage to the building, and the depreciation of the rental value of the room for four months, which motion the court overruled. The verdict showed that the jury assessed as separate items of damages amounts upon the building and wallpaper, twenty-five dollars, upon the rental value, thirty-six dollars, and upon the building, one hundred and twenty-five dollars.

At the proper time, appellant also moved the court to modify the judgment so as to exclude therefrom the amounts assessed upon the foregoing items. This motion was also overruled. To these rulings appellant duly reserved exceptions.

The complaint alleges that the plaintiff was, at the time of the explosion, the owner of a storeroom in the town of Sheridan and stock of general merchandise, et cetera, which he held for sale at retail in said storeroom, et cetera.

²⁵⁴ The action was personal, to recover damages sustained by appellee for injury to said storeroom and stock of merchandise. The plaintiff had the right to recover damages to the storeroom,

although the title to the realty was in himself and wife as tenants by entireties. In *Fairchild v. Chastelleux*, 1 Pa. St. 176, 44 Am. Dec. 117, it is held that when husband and wife own real estate as tenants by entireties, the husband, without joining his wife, may sustain an action for damages to the real estate, the court using the following language: "But when the title does not come in question, and the action is merely personal, and seeks a compensation in damages for an injury done to the husband's interest in the wife's estate during the marriage, then it is in his election whether he will join his wife in the action or not." In *Washburn v. Case*, 1 Wash. Ter. 253, plaintiff brought suit for damages done his crops by the cattle of defendant. Upon the trial, it being disclosed that a third party had an interest in the crops, the court summarily dismissed the action because of the nonjoinder of said third party. It was held that the trial court erred in so doing; that the interest of the part owner might be consistent with the right of plaintiff to recover for the trespass and at most could only operate as a partial failure of proof.

In *Bristol Hydraulic Co. v. Boyer*, 67 Ind. 236, the supreme court cites the case of *Cutts v. Spring*, 15 Mass. 135, which was an action of trespass quare clausum fegit brought by plaintiff against defendant for cutting timber upon his land. The plaintiff was in possession of the land but the title thereto was in the state. After quoting from the decision, our supreme court said:

"The principle settled by these and other decisions is, that one having the possession of property may ²⁵⁵ maintain an action against a wrongdoer for an injury thereto, which cannot be defeated by showing the title to be in someone else than the plaintiff." See, also, 1 Bishop on Married Women (1873), 623; Dicey on Parties to Action, rule 87.

It is clear from these authorities that appellee had the right to recover for damages to the storeroom of which he was in possession, engaged in business, whether the title to the real estate was in himself or in himself and his wife as tenants by entireties. But even if the wife should have been joined as plaintiff, the position of appellant is not tenable because the failure so to join her would only give rise to a plea in abatement, the defect not being apparent on the face of the complaint. This plea not having been interposed, the objection is deemed to have been waived: Dicey on Parties to Action, rule 117; *Moore v. Harmon*, 142 Ind. 557, and authorities there cited.

The court did not err in overruling the motion to modify the

judgment. The appellant does not claim that the separate amounts assessed for damages to the realty are excessive, but that appellee was not entitled to any damages on that account.

Having held that he had the right of action without joining his wife, it follows that the motion was properly overruled.

We find no error for which the judgment should be reversed. The judgment is affirmed.

HUSBAND AND WIFE—TENANTS BY ENTIRETIES—TRESPASS may be maintained by a husband for injuries to land which he holds as tenant by entirety with his wife, without her joining in such action: *Fairchild v. Chastelleux*, 1 Pa. St. 176; 44 Am. Dec. 117.

NONJOINDER—PLEA IN ABATEMENT.—A nonjoinder of parties is matter for a plea in abatement: *Le Page v. McCrea*, 1 Wend. 164; 10 Am. Dec. 469; *Hilliker v. Loop*, 5 Vt. 116; 26 Am. Dec. 283. If it is not apparent from a bill itself that necessary parties are omitted, it can be taken advantage of only by plea or answer, showing who are the necessary parties, and making the objection of a want of parties in a plain and explicit manner: *Robinson v. Smith*, 3 Paige, 222; 24 Am. Dec. 212. The nonjoinder of a party to a real action must be pleaded in abatement or the objection is lost: *Campbell v. Wallace*, 12 N. H. 362; 37 Am. Dec. 219.

PLEA IN ABATEMENT IS WAIVED by going to trial on the merits: *Welchel v. Thompson*, 39 Ga. 559; 99 Am. Dec. 470.

JUSTICE v. LAIRY.

[19 INDIANA APPEALS, 272.]

ATTORNEYS AT LAW—PARTNERSHIP BETWEEN, DISSOLUTION OF, BY OPERATION OF LAW.—If a member of a law firm accepts the office of judge of a court, that act effects an immediate dissolution of the firm by operation of law, whether his co-partners consent to his withdrawal from the firm or not.

ATTORNEY AND CLIENT—RELATION OF, WHEN DISSOLVED BY OPERATION OF LAW.—If a member of a law firm accepts the office of judge of a court, that, so far as he is concerned, effects a termination by operation of law, of the relation of attorney and client.

ATTORNEY AT LAW—DIVISION OF FEES AFTER DISSOLUTION OF FIRM.—If an attorney at law, who, is a member of a law firm, becomes a judge of a court, his contract of employment in pending business is of a divisible nature, under which he may recover for services of which the client has already had the benefit, but he has no interest in any fees for services rendered by the remaining member of the firm in concluding that particular business.

A. C. Harris and D. C. Justice, for the appellant.

S. T. McConnell and A. G. Jenkins, for the appellees.

272 **ROBINSON, C. J.** Appellant filed an itemized claim for attorney fees in a certain ditch proceeding asking an allowance for services in such proceeding from June 6, 1895, to March 26,

1896, in the sum of \$180. At the same time a claim was filed by Justice & Lairy for fees for services in the same ditch proceeding in the sum of \$65. Appellant and appellee composed the firm of Justice & Lairy. Appellee filed written objections to the allowance of any claim to appellant individually on the ground that the services rendered by appellant were rendered in behalf of Justice & Lairy, who were partners in the closing up of said ditch proceedings which were begun by said firm before its dissolution; that appellee was employed by the petitioners in said proceedings, who were his clients, and that he did individually a large share of the work in said proceedings during the existence of ²⁷³ said firm and whatever services were rendered by said Justice individually were simply and only rendered in completing work which the firm was employed to do and had begun during said partnership, and asked that whatever sum be allowed to Justice & Lairy be to the firm of Justice & Lairy. A motion to strike out the objections was overruled, and upon issue joined the court made a special finding of the facts with conclusions of law.

It appears from the special finding that on the first day of June, 1893, appellant and appellee entered into a partnership in the practice of law by written articles of partnership; by these articles each partner was to devote his time and talents to the firm, and the receipts and expenses were to be apportioned in a prescribed manner; that said partnership continued until the evening of March 30, 1895, when appellee was appointed circuit judge by the governor to fill a unexpired term, and on April 1, 1895, appellee qualified as such circuit judge and from that time until November 2, 1896, filled said office and discharged the functions thereof; that the petitioner Baldwin employed said firm of Justice & Lairy to prepare the necessary papers and documents and prosecute the proceeding for the construction of the ditch in controversy, which proceeding was instituted on the — day of —, 1894; that whatever work was done in said proceeding during the continuance of said partnership was done by said Lairy for and on behalf of said firm; that after the dissolution of said firm appellant carried on and completed the said ditch proceedings without the assistance of said Lairy, and without any agreement having been entered into between appellant and appellee as to what, if any, compensation appellant should receive individually for his said services ²⁷⁴ rendered or to be rendered after the dissolution of said firm, and without anything having been said between them on the subject, and no new or other agreement

was made between the parties to conduct and prosecute said proceeding, and that appellant rendered said services without anything having been said by or to appellee on the subject, and without anything having been said by or to said Baldwin on the subject; that the total amount of attorney fee due and unpaid on account of such services rendered under such employment of the firm of Justice & Lairy is \$245.

The court stated its conclusions of law and order as follows: "Upon the foregoing facts, the court concludes, as a matter of law, that the firm of Justice & Lairy was dissolved by the voluntary abandonment thereof by said Lairy, and that said Justice would be entitled to recover reasonable compensation for services by him rendered in such case after such dissolution in a proceeding for an accounting between such partners; that under the issue in this case the court is not authorized to make such accounting or fix the amount of such compensation; that the said objections of Moses B. Lairy and his said motion should be sustained, and that the entire allowance should be made to Justice & Lairy. It is therefore ordered and adjudged by the court that the objections and motion of Moses B. Lairy to the claim by Dewitt C. Justice be sustained, and that the firm of Justice & Lairy be allowed the sum of \$245, and that the drainage commissioner pay said sum to the clerk of this court to be paid out as may be hereafter ordered by the court."

Appellant excepted to the conclusions of law, and moved the court to make the findings more specific so as to show that the \$180 embraces only the ²⁷⁵ services rendered by appellant after the dissolution of the partnership, and that the court separate the amount of total compensation so as to show that \$65 was earned by the firm while in existence, and the \$180 earned by appellant individually after the firm dissolved. This motion was overruled and exception taken. Appellant then moved for a venire de novo, because the finding did not cover all the issues, and was ambiguous, which motion was overruled. Appellant moved for a new trial on the ground that the finding was not sustained by sufficient evidence and that the court failed to find the value of the services rendered by the firm, or the value of the services rendered by appellant after the dissolution, and failed to separate the items constituting the allowance of \$245 so as to show that \$65 was for services rendered by the firm, and \$180 for the individual services of appellant.

The errors assigned are, the conclusions of law on the facts

found, and the overruling of the motion for a further finding of the facts, and the motion for a new trial.

The record recites that the claim for \$65 was not contested, and that upon the trial of the claim for \$180 and the objections of appellee, appellant testified that when the partnership was dissolved, on April 1, 1895, by appellee accepting the office of circuit judge, the partnership sign was removed, appellee's furniture taken from the office, and that appellant did no business after that date on partnership account; that the bill for \$180 is for individual services of appellant after the dissolution; that the partnership was never renewed; that when the services were rendered embraced in the bill for \$180, appellee was filling the office of circuit judge; that the services were charged on appellant's individual account-book; ²⁷⁸ that each item charged in the bill is for the individual labor of appellant. There was no other or different evidence given concerning the claim for \$180.

The only question to be determined on this appeal is whether appellee has any interest in the \$180.

The partnership was dissolved the moment appellee accepted the office of judge of the circuit court. Whether or not appellant consented to appellee's withdrawal from the firm is not material. As expressed by the trial court the firm "was dissolved by the voluntary abandonment thereof" by appellee. Appellee voluntarily incapacitated himself from rendering any further professional services in the case. While holding the office of circuit judge he could neither directly nor indirectly practice law in any of the courts of the state, nor give counsel or advice in relation to any business in such courts: Burns' Rev. Stats. 1894, sec. 2106.

It seems to be the settled rule that when an attorney, without cause, abandons an employment which he has been retained generally to conduct to its determination he cannot recover for any services which he has rendered. But if the employment is terminated by the combined act of the attorney and client, the attorney may recover for services actually rendered: 3 Am. & Eng. Ency. of Law, 2d ed., 429.

In the case at bar, the relation of attorney and client, so far as concerned appellee, was terminated by operation of law, but appellee would be entitled to compensation for services rendered by him in the case up to the time of his incapacity to practice: 3 Am. & Eng. Ency. of Law, 2d ed., 429; Baird v. Ratcliff, 10 Tex. 81.

It needs no citation of authorities to the effect that, as a gen-

eral rule, in an ordinary partnership a partner ²⁷⁷ is not entitled to compensation for services rendered in closing up partnership business, and that in the absence of a contract one partner, who does a larger share of the work than his copartner, cannot recover compensation for such extra work. The large number of cases cited by counsel for appellee in support of the above rules are cases involving some kind of mercantile associations. But we do not think the rules governing such associations are controlling in all respects in law partnerships. Thus it is said that a law partnership does not confer on any of the partners the extensive powers of mercantile associations, as in binding each other in the ordinary course of business by bills of exchange and like matters: *Weeks on Attorneys at Law*, sec. 244. See *Osment v. McElrath*, 68 Cal. 466; 58 Am. Rep. 17; *Starr v. Case*, 59 Iowa, 491.

And there are exceptions to the above rules concerning compensation in commercial partnerships; as, where a surviving partner carries on the partnership business in order to complete the enterprise in which the partnership is engaged, he will be allowed compensation: 17 Am. & Eng. Ency. of Law, 1183, and cases there cited. The reason for the rule that no compensation is allowed a surviving partner in closing up the business is based upon an implied, if not expressed, agreement that should the partnership be terminated by some involuntary event, the other will close up the business for the benefit of both. Each partner necessarily incurs such risks with reference to which the partnership contract was made. But in the case at bar, aside from the fact that the incapacity to continue in the case was self-imposed by appellee, there was no value in the unfinished case to an attorney, except the value of professional services to be rendered. Whether it should have any value ²⁷⁸ depended entirely upon the professional skill of the attorney rendering the services. So that the reason for the rule that no compensation is allowed a surviving partner cannot be said to apply in all respects to a professional partnership.

In the case at bar, the law, by the voluntary act of appellee, terminated the relation of attorney and client. Appellee was powerless to make any further contract with his client. By his own act he placed himself in a position where he could render his client no further service whatever. He could receive no further fees either directly or indirectly. He severed his connection with the case absolutely, and lost any right to any fees in the case under his original employment from that time on. Had but one claim been filed for the total amount of fees a very different

question would be presented. But there is no controversy that the record determines the value of the firm's services before the dissolution and the value of appellant's services after the dissolution. Under the evidence, the trial court was not asked to make any accounting between the partners.

It appears that the services of appellant in the case, after the dissolution, were rendered while appellee was a circuit judge. Had appellant, after the dissolution, mismanaged the business to the client's damage, can it be said that appellee would be jointly liable in damages with appellant? It certainly cannot be said that a person who is absolutely inhibited from assisting, either directly or indirectly, in doing an act, must answer in damages where the act without his knowledge or consent is negligently done to another's damage.

It is argued by appellee's learned counsel that when appellee left the firm he left its goodwill with appellant, and it is just to presume that it had considerable ²⁷⁹ value. Admitting this to be true, it could be a proper item only in an accounting between the partners, with which we have nothing to do in this case. It is not disputed that the services of the firm up to the dissolution were worth \$65. As the record comes to us, we must conclude they were worth that much and no more. We have nothing to do in this case with how that shall be divided between the partners; nor is it an adjudication of any partnership accounts to direct the \$180 to be paid to the only person to whom it has ever belonged.

In the case of *Denver v. Roane*, 99 U. S. 355, it was not expressly decided whether a different rule should apply to the winding up of the business of a law firm, as the partners had agreed on the manner of closing up the business. It appeared that in that case one member of the firm, Judge Hughes, in one of the firm cases (*Lamar v. United States*), withdrew his appearance, and had his name erased from the docket as an attorney in the case, because he thought it was a corrupt one, and took no further part in prosecuting the claim, and paid no further attention to it. The remaining members of the firm prosecuted the suit to a successful ending. After Hughes' death the executor of his will brought suit for a discovery, and to recover from the surviving partners the share of the testator in the fees received by them out of the partnership business which remained unfinished when the general partnership was dissolved. In holding that the executor could not recover any part of the fee in that particular case (*Lamar v. United States*), the court said: "If, then, by

abandoning the case and denouncing it as fraudulent, he lost all the right which he had against Lamar, how can he claim from his copartners any of the compensation they obtained for conducting the case after his abandonment, ²⁸⁰ to final success? His action was a breach of his duty to those partners, as well as of his obligation to Lamar. By this agreement of copartnership he had undertaken to share in the labor, and to promote the common interests of the firm, and that was the foundation of his right to share its earnings."

While we are not declaring that a different rule should in every instance be applied in closing up the business of a law firm from that applied in other partnerships, yet there are sound reasons for holding that when an attorney at law, who is a member of a law firm, becomes a judge of a circuit or other court, at that instant the partnership is dissolved, and that a contract of employment in pending business in such a case is of a divisible nature, under which a recovery may be had for services of which the client has already had the benefit, but that such a person can have no interest in any fees for services rendered by the remaining member of the firm in concluding that particular business. Appellee took the office of circuit judge with its burdens, one of which was that he should cease absolutely to practice law. The only basis upon which his right to a portion of the after earned fee could rest would be that he still retained some interest in the firm, and that the statute does not permit. This is not a case where the remaining member of the firm rendered professional services in collecting a fee which the firm had earned before the dissolution. Under the evidence the court should have directed the \$180 to be paid to appellant by the drainage commissioner.

Judgment reversed, with instructions to the circuit court to sustain appellant's motion for a new trial.

ATTORNEYS AT LAW—DISSOLUTION OF FIRM—RIGHT TO FEES.—When a professional partnership between attorneys at law is dissolved by the death of one, the survivor is entitled to his own future earnings: *Little v. Caldwell*, 101 Cal. 553, 561; 40 Am. St. Rep. 89, 94.

FRANKFORT v. COLEMAN.

[19 INDIANA APPEALS, 368.]

MUNICIPAL CORPORATIONS—INJURY CAUSED BY DEFECT IN STREET—COMPLAINT, WHEN SUFFICIENT.—A complaint against a city for a personal injury caused by a defect in a street states a good cause of action where it appears from the complaint that the plaintiff was injured at a place upon a public street of the city; that the city had notice of the defective condition of the street; that the place where the injury occurred was within the corporate limits of the city, and that such place was one which it was the city's duty to keep in repair.

MUNICIPAL CORPORATIONS—INJURY CAUSED BY DEFECT IN STREET—COMPLAINT, WHEN SUFFICIENT.—A complaint against a city for a personal injury caused by a defect in a street states a good cause of action where it is alleged that the plaintiff, while walking home on a public street of the city, used by the public generally, stepped into one of a number of holes and excavations in the street, without fault on his part, and was injured; that such holes and excavations were dug more than sixty days prior to the injury; that the city had notice of them at the time they were dug and that it negligently and carelessly allowed them to remain; but that the plaintiff had no knowledge of their existence.

MUNICIPAL CORPORATIONS—DUTY OF, TO KEEP IN REPAIR A HIGHWAY BROUGHT WITHIN THE CORPORATE LIMITS.—If a city brings a highway within its corporate limits and leaves it open for public travel, the city is bound to keep it in a reasonably safe condition for travel, whether the road was laid out and opened by the board of county commissioners, or had become a public highway by user.

MUNICIPAL CORPORATIONS—DUTY OF, TO KEEP STREETS IN REPAIR, WHETHER IMPROVED OR NOT.—If a street within the limits of a city, whether improved or not, is in common use by the public, it is the duty of the city to keep it in a reasonably safe condition for ordinary travel.

MUNICIPAL CORPORATIONS—SIDEWALK AS A PART OF THE STREET—AUTHORITY OF CITY.—A sidewalk is a part of the street, and the authority of a city over a street extends over the sidewalk as a part of the street.

APPEAL—CONFLICTING EVIDENCE.—THE VERDICT OF A JURY will not be disturbed on appeal, where the evidence is conflicting, if there is some evidence to support it, no matter what the appellate tribunal may think about the preponderance of the evidence.

MUNICIPAL CORPORATIONS—NOTICE OF DEFECT IN STREET.—Actual notice, on the part of a city, of a defect in a street or sidewalk, is not necessary, if the defect has existed for such a time that, with reasonable diligence, it might have been known.

MUNICIPAL CORPORATIONS—INJURY CAUSED BY DEFECT IN STREET—CONTRIBUTORY NEGLIGENCE.—Although a person injured by reason of a defect in a street had knowledge of such defect, that fact would not, of itself, deprive him of his right of action; but such knowledge, with all the other facts, is to be considered by the jury in determining whether he was guilty of contributory negligence.

HIGHWAYS — PLACE OF INJURY — STREET.—One injured in a street is injured in a public highway.

HIGHWAY—CREATION OF, BY USER.—If a highway has been used by the public for more than twenty years, it becomes a lawfully existing highway, and the right of the public to use it becomes fixed.

DAMAGES—EXCESSIVE VERDICT—RULE AS TO DISTURBING.—A verdict of a jury will not be disturbed on account of excessive damages, unless they are so outrageous as to induce the court to believe that the jury must have acted from prejudice, partiality, and corruption.

APPEAL—WHAT STATEMENT BY COURT IS NOT REVERSIBLE ERROR.—If witnesses are absent when they are called to testify, during the trial of a cause, it is improper; but not reversible error, for the court to remark, in the presence of the jury, "I do not feel disposed to keep this jury waiting at the expense of the county to suit the convenience of saloonkeepers and gentlemen of elegant lelsure."

J. T. Hockman, for the appellant.

O. E. Brumbaugh and Joseph Combs, for the appellee.

369 ROBINSON, C. J. Appellant appeals from a judgment recovered by appellee for injuries received because of a defective sidewalk, and assigns as error the overruling of the demurrer to the complaint, the overruling of the motion for a new trial, and the motion in arrest of judgment.

The complaint alleges, in substance, that on the fourth day of July, 1894, appellee, in the exercise of due care and caution, was walking home on a public highway and street known as Fifth street in said city, which street was used by the citizens thereof and the **370** public generally and had been for more than ten years prior thereto; that said highway had negligently been allowed to become and was out of repair and in a dangerous condition for pedestrians to travel over, on account of a number of dangerous holes and excavations in that part generally used by pedestrians; that said holes were dug more than sixty days prior to the date aforesaid, and that the city had notice of them at the time they were dug, but carelessly and negligently failed and neglected to repair said highway, or to fill up or remove said dangerous holes and excavations all of said time; that appellee at said time had no knowledge of the existenc of said holes, and that the night was too dark for her to see them; that by reason of the carelessness and negligence of appellant in permitting said holes to be and remain in said highway, and by carelessly and negligently failing to repair the same for a period of more than sixty days, appellee, without any fault or negligence on her part, stepped and fell into one of said holes and excavations, whereby she was greatly and permanently injured, the particulars of which are set out in the complaint. We do not think the complaint

open to the objections urged against it. It appears from the complaint, taking the pleading as a whole, that the place where appellee was injured was upon a public street of said city; that the city had notice of the defective condition of the street, that the injury occurred at a place within the corporate limits of the city, and at a place which it was the city's duty to keep in repair.

The first, second, and third causes for a new trial were that the verdict was not sustained by sufficient evidence, and was contrary to the evidence and the law. These are considered together in appellant's brief, and will be so considered here. It is insisted by appellant's counsel that if any excavation existed where appellee was injured, it was on the outside of ³⁷¹ the line of the street, and was not at a place which the city was bound to keep in repair. The highway upon which the injury occurred was already in existence when the territory through which it passes became a part of the city; and when this territory was annexed the highway remained and still remains as it then was. The city, by bringing the highway within its corporate limits and leaving it open for public travel, became bound to keep it in an ordinarily and reasonably safe condition for travel. The duty of the city to keep the way in repair was the same, whether the road was laid out and opened by the board of county commissioners or had become a public highway by user.

In 1872, the board of commissioners of the county established a certain highway along the line where the alleged injury occurred. There is a conflict in the evidence as to the location of the exact boundary lines of this highway, and a conflict as to whether the hole or excavation causing the alleged injury is within the limits of the highway thus established by the board. The highway laid out by the board was described as "commencing at the south end of Fifth street, in Torrence's addition to the town of Frankfort; thence south, with the variations of said street, about seventy poles," et cetera. The road was made fifty feet wide. A question arose on the trial whether this road, as laid out, was run with the variations of the town or with the section line. There was some evidence to the effect that the road established by the board was never opened and used by the public, but that a different way was opened and used. And there was evidence that the holes or excavations were within the limits of the road as established by the board of commissioners and that they were within the limits of the road as opened and used by the public, ³⁷² and there is evidence that the city, through its street commissioner, had expressly recognized the walk where

the injury occurred as a part of the street or highway. In *Lafayette v. Larson*, 73 Ind. 367, it is said: "When a street within the limits of a city is in common use by the people, it is the duty of the city to keep it in a reasonably safe condition for ordinary travel: *Indianapolis v. Gaston*, 58 Ind. 224. This is true whether the street be what is technically called an improved street or not": See *Fowler v. Linguist*, 138 Ind. 566. A sidewalk is a part of a street, and a city's authority over a street extends over the sidewalk as a part of the street: *Taber v. Grafmiller*, 109 Ind. 206; *Kokomo v. Mahan*, 100 Ind. 242; *State v. Berdetta*, 73 Ind. 185, 38 Am. Rep. 117.

Counsel for appellant and for appellee have filed very voluminous briefs, and much space is occupied discussing evidence which was conflicting. There is evidence in the record that the defects were within the limits of the way as established and laid out by the board of commissioners, and that the defects were within the limits of a way used by the public continuously for more than twenty years. Much of the testimony of some of the witnesses is very unsatisfactory as it comes to us, for the reason that they testify directly from maps, and while the maps are in the record, there is nothing by which we can tell, in a great many instances, what lines or points were testified about. We have given the evidence a careful consideration, and there is some evidence to support the finding. The rule is too well settled to need the citation of any authorities that the verdict of a jury will not be disturbed where there is some evidence to support it, no matter what the appellate tribunal may think about the preponderance of the evidence.

373 It is claimed by counsel that it is not shown that the city had notice of the defect. The particular defect consisted of some half dozen holes from six to eight inches in diameter, and from two or three to ten inches in depth. There is evidence tending to show that the street commissioner of the city knew of the holes in the street; but whether there is sufficient evidence to show that the city had actual notice, there is evidence that the holes were dug in the walk in April, and remained there until July, when appellee was injured. A number of witnesses testified to having seen the holes at different times between the time they were dug and the time of the accident. It is a well-settled rule that actual notice, on the part of a city, of a defective street or sidewalk, is not necessary if the defect has existed for such a time that with reasonable diligence the defect might have been known: *Buscher v. Lafayette*, 8 Ind. App. 590; *Evansville v.*

Wilter, 86 Ind. 414; Logansport v. Justice, 74 Ind. 378; 39 Am. Rep. 79. See Columbus v. Strassner, 124 Ind. 482.

It is argued by counsel that if appellee had passed along the street, and there were holes in the path or sidewalk, she knew the holes were there, and if, with this knowledge, she went there the night of the injury, she assumed all risks. We do not question the rule that a person going upon a sidewalk known by him to be dangerous must exercise care in proportion to the danger he might encounter by reason of the defect: Indianapolis v. Cook, 99 Ind. 10. But in the case at bar there was evidence from which the jury may have concluded that appellee did not know of the defect in the walk. And, if she did have the knowledge of the defect, that fact itself would not deprive her of her right of action. In such case, the fact that a person has knowledge of the defect, with all the ³⁷⁴ other facts bearing on the question, is to be considered by the jury in determining whether such person was guilty of contributory negligence: Columbus v. Strassner, 124 Ind. 482. Taking all the evidence bearing upon appellee's freedom from fault, we cannot say that at the time she was injured she failed to exercise such care as a reasonably prudent person would exercise under like circumstances: See Fowler v. Linquist, 138 Ind. 566.

Appellant's counsel says that the thirteenth instruction given by the court to the jury might be proper in certain cases, but that it was not applicable to the case on trial. This instruction is as follows: "A way which has been used by the public as a public highway continuously for twenty years, becomes a public highway, and the width of the highway is determined by the width of the road as used at the end of twenty years. All parts of the road used by the public at the end of that time are part of the public highway." There was evidence to the effect that the public had used the particular place where the injury occurred for more than twenty years, and that it was a part of a highway used by the public. Although the place was a street in a city, it was no less a public highway: Elliott on Roads and Streets, 12. When the city took within its corporate limits a highway, and the public continued to use the highway as it existed and had been used before, and such use had continued for more than twenty years, a highway, in which the public acquired the right to travel, became established, and it became the duty of the city to keep it in a reasonably safe condition for travel. Where a highway has been used by the public for more than twenty years, it becomes a lawfully existing highway, and the right of the pub-

lic to use it becomes fixed: *Fort Wayne v. Coombs*, 375 107 Ind. 75; 57 Am. Rep. 82. The force and effect of such use as against a city attempting to lay out or widen a street presents an entirely different question, with which we have nothing to do in this case.

The jury returned a verdict for one thousand dollars, which appellant's counsel argue is excessive. Appellee testified that she was forty-eight years of age when injured and in good health; that she did all her own housework and worked for others prior to her injury; that since the injury she had suffered pain all the time, and has never been able to do all her housework, and that the injury was growing worse. There was further evidence that the injury is of such a character that it produces great pain, is not easily cured, and in a very large proportion of cases there is no recovery from it. A jury has a very broad discretion in the matter of damages, and, as a general rule, the verdict of a jury will not be disturbed on account of excessive damages, unless they are, as said by Chancellor Kent, "so outrageous as to strike every one with the enormity and injustice of them, and so as to induce the court to believe that the jury must have acted from prejudice, partiality and corruption": *Lake Erie etc. Ry. Co. v. Acres*, 108 Ind. 548; *Pittsburgh etc. Ry. Co. v. Sponier*, 85 Ind. 165; *Louisville etc. Ry. Co. v. Falvey*, 104 Ind. 409; *Lauter v. Duckworth*, 19 Ind. App. 535; *Ohio etc. Ry. Co. v. Judy*, 120 Ind. 397; *Kelley v. Kelley*, 8 Ind. App. 606. We cannot say that the amount assessed by the jury in this case is excessive.

Complaint is made of alleged misconduct of the court during the trial. It appears by a bill of exceptions that during the trial appellant called three witnesses, and, none of them being in the courtroom when they were called to testify, the court, in the hearing and presence of the jury said: "If you will furnish the names of the absent witnesses to the clerk, 376 I will see that they are brought in. I do not feel disposed to keep this jury waiting at the expense of the county to suit the convenience of saloonkeepers and gentlemen of elegant leisure. I saw one of these witnesses as I came to court, and he can be obtained easily." Appellant's counsel objected and excepted to the remarks, to which the court replied, "I stand by what I said," to all of which appellant excepted. The particular expression to which appellant's counsel objects is the expression "saloonkeepers and gentlemen of elegant leisure." While we cannot approve the making of such a statement by a trial court, yet we do not think such conduct is reversible error. The expression was not in the nature of evidence, nor was it a statement of any fact which

would necessarily discredit the testimony of a witness to whom it might be applied. We are not prepared to say that such a remark would prejudice appellant's case before a jury of average intelligence. It was not necessarily discrediting the witnesses. We are not able to say what the court meant by "gentlemen of elegant leisure," and we cannot presume that the jury understood the words as a reflection upon the truthfulness of the witnesses. We cannot say that the words used would tend to destroy the character of the testimony of the witnesses in the estimation of the jury. Such a statement by a court in the presence and hearing of a jury is error, but we cannot say it is reversible error.

Upon many of the questions involved in this case, the evidence, as we have said, is not very satisfactory, but upon none of the issues, to establish which the burden was upon appellee, can we say there was a failure of proof. There is some evidence in the record to sustain the conclusion reached by the jury, and in that view of it, we cannot disturb the finding.

Judgment affirmed.

MUNICIPAL CORPORATIONS—DUTY OF, TO KEEP HIGHWAY IN REPAIR.—A city is not bound to keep in repair a county road in a sparsely settled portion of its territorial limits, for its entire width, but only to an extent sufficient for travel: *Monongahela City v. Fischer*, 111 Pa. St. 9; 56 Am. Rep. 241.

MUNICIPAL CORPORATIONS — DUTY OF, TO KEEP STREETS IN REPAIR.—A city must keep its streets and sidewalks in a reasonably safe condition, and for a breach of this duty an action will lie in favor of a person injured thereby: *Notes to Farley v. Mayor*, 57 Am. St. Rep. 514; *Dunn v. Barnwell*, 49 Am. St. Rep. 846; *Duncan v. Philadelphia*, 51 Am. St. Rep. 782; *Blyhl v. Waterville*, 47 Am. St. Rep. 600.

APPEAL—CONFLICTING EVIDENCE.—NEITHER THE VERDICT OF A JURY nor findings of fact will be disturbed, on appeal, where the evidence is conflicting, if there is some competent evidence to support the verdict or findings: *Relley v. Haynes*, 38 Kan. 259; 5 Am. St. Rep. 737; *notes to Bohannon v. Combs*, 10 Am. St. Rep. 329; *Savannah etc. Ry. Co. v. Flannagan*, 14 Am. St. Rep. 188; *Singleton v. Hill*, 51 Am. St. Rep. 869; *Warner v. Southern Pac. Co.*, 54 Am. St. Rep. 337.

MUNICIPAL CORPORATIONS—INJURY CAUSED BY DEFECT IN STREET—NOTICE OF DEFECT.—If a dangerous hole or defect in a street has existed for such a length of time that the city authorities, by the exercise of ordinary diligence, would have discovered it in time to prevent an accident, the city cannot escape liability therefor for want of actual notice. In such a case, it is deemed to have constructive notice, which is sufficient without proof of actual notice: *Lorence v. Ellensburg*, 13 Wash. 341; 52 Am. St. Rep. 42, and note. A city is not answerable for injuries caused by a defect in a street, unless it had notice of the defect, or unless it had existed for such a length of time as to apprise its officers if they were diligent in performing their duties: *Note v. Farley v.*

Mayor, 57 Am. St. Rep. 514; Cunningham v. Denver, 23 Colo. 18; 58 Am. St. Rep. 212; note to Buchanan v. Barre, 44 Am. St. Rep. 832, 833.

MUNICIPAL CORPORATIONS—INJURY CAUSED BY DEFECT IN STREET—KNOWLEDGE OF DEFECT.—Previous knowledge by a person injured of the existence of a defect in a sidewalk does not per se establish negligence on his part: Russell v. Monroe, 116 N. C. 720; 47 Am. St. Rep. 823; but such knowledge is competent evidence on the question of his contributory negligence: McQuillan v. Seattle, 10 Wash. 464; 45 Am. St. Rep. 799, and note.

HIGHWAYS—CREATION OF BY USER—STREETS AS HIGHWAYS.—Highways may be created by user: See monographic note to Whitesides v. Green, 57 Am. St. Rep. 746, 747, on highways by user, and showing various periods of time which have been held sufficient to constitute a legal establishment of a highway. The streets and alleys of a town or city are highways: Note to Whitesides v. Green, 57 Am. St. Rep. 745.

NEW TRIAL—EXCESSIVE DAMAGES—RULE AS TO DISTURBANCE OF VERDICT.—A judgment for excessive damages will not be reversed unless so excessive as to warrant a belief that the verdict was the result of prejudice, passion, or corruption: Sheehy v. Kansas City etc. Ry. Co., 94 Mo. 574; 4 Am. St. Rep. 396; Sutton v. Snohomish, 11 Wash. 24; 48 Am. St. Rep. 847.

TEUTONIA LOAN AND BUILDING CO. v. TUBRELL.

[19 INDIANA APPRAIS, 469.]

NOTARIES PUBLIC ARE PUBLIC OFFICERS.

NOTARIES PUBLIC.—THE POWER TO ADMINISTER OATHS is not one of the common-law powers of a notary, but is conferred only by legislative enactment.

EVIDENCE—JUDICIAL NOTICE—POWER OF NOTARY IN ANOTHER STATE TO ADMINISTER OATHS.—Whether a notary public in another state has power to take affidavits is a matter of which the courts of this state cannot take judicial notice.

NOTARIES PUBLIC—TAKING OF AFFIDAVITS—PRESUMPTION—JURISDICTION.—The presumption is, that a notary public, in taking an affidavit, acted within his jurisdiction, and administered the oath where he had a right to administer it.

NOTARIES PUBLIC—TAKING OF AFFIDAVITS—PRESUMPTION—JURISDICTION.—If an affidavit, in its caption, purports to have been made in this state, but the notary, in his certificate, designates his jurisdiction as within another state, the presumption is controlling that the officer took the affidavit in such other state.

ATTACHMENT AND GARNISHMENT—PROCEEDINGS IN, ARE DEPENDENT UPON SUFFICIENT AFFIDAVITS.—After affidavits in attachment and garnishment have been held insufficient, no subsequent proceedings, based on such affidavits, are valid until new and sufficient affidavits are filed.

MOTION FOR NUNC PRO TUNC ORDER—AFFIDAVITS IN ATTACHMENT AND GARNISHMENT.—If, while the sufficiency of affidavits in attachment and garnishment is under consideration by the court, additional affidavits are simply filed with the clerk, and the former are subsequently held to be insufficient, a motion for a nunc pro tunc entry, showing that such additional affidavits were so filed as of a prior date, is properly overruled, where the additional affidavits could only have been properly filed in open court and by leave of the court.

Orris P. Cobb, Edwin J. Howard, and George W. Woods, for the appellant.

J. E. Scott, for the appellee.

⁴⁶⁰ ROBINSON, C. J. Appellant sued appellee, and filed an affidavit and bond in attachment, and also an affidavit in garnishment. The garnishee defendant, John Herron, executor of the last will of Electa Herron, deceased, appeared specially and moved to quash the writs of attachment and garnishment, which motions ⁴⁷⁰ were sustained, and these rulings are the first errors assigned.

It is argued that the affidavit in attachment was insufficient, for the reason that it appears from the venue of the affidavit that it was sworn to in Marion county, Indiana, and from the certificate of the notary before whom the affidavit was sworn, and his official seal, that the oath was administered in Marion county, Indiana, by one Orris P. Cobb, a notary public in and for Hamilton county and state of Ohio; and that there is no certificate of the clerk of the circuit or district court or court of common pleas in Hamilton county, Ohio, that such notary is, by the laws of that state, empowered to administer oaths and take affidavits.

In the particulars above named, the affidavits in attachment and garnishment are the same. The affidavit in attachment, as to the objection urged, is as follows:

"State of Indiana, }	ss.
"Marion County. }	
"THE TEUTONIA LOAN AND BUILDING COMPANY,	} No. 45716. Superior Court.
v.	
"OSCAR TURRELL.	

"Affidavit in Attachment.

"Gottlieb Holz, being duly sworn, et cetera, as affiant verily believes.

"(Signed)

"G. HOLZ.

"Subscribed and sworn to before me this second day of September, 1893.

"ORRIS P. COBB,

"Notary public in and for Hamilton county and state of Ohio.

"[Notarial seal Hamilton county, Ohio.]"

A notary public is a public officer. The office originated in the early Roman jurisprudence and was known in England before the conquest. All acts done by a notary public, which fall with-

in the rules of the law merchant, have always been respected under the law of nations. But there are certain acts which do not belong to the office except by virtue of a statute. One of these is taking affidavits. All the states have ⁴⁷¹ conferred this power upon notaries, but the courts of any one state cannot take judicial notice of a statute of another state conferring this power. We have a statute in this state which provides that certificates or instruments purporting to be the official act of a notary public of this state or of any other state, and purporting to be under the seal and signature of such notary public, shall be received as presumptive evidence of the official character of such instrument and of the facts therein set forth: Burns' Rev. Stats. 1894, sec. 464. But it is evident that this section was not intended to apply to taking an affidavit in another state, as that is especially provided for in another section.

Section 483 of Burns' Revised Statutes of 1894 provides that: "When any affidavit is taken in another state, and certified by the officer or justice of the peace taking the same, under his hand and seal of office, if he have any such seal, and attested by the clerk of the circuit or district court, or court of common pleas of the county where such officer exercises the duties of his office, under the hand of the clerk and seal of his court, the clerk also certifying that the officer or justice of the peace is, by the laws of said state, duly empowered to administer oaths and affirmations, and take affidavits, every such affidavit shall be deemed sufficiently authenticated, and may be received and used in any of the courts of this state."

In the case at bar, the officer was a notary in and for Hamilton county, Ohio, and the presumption is, that he acted within his jurisdiction and administered the oath where he had a right to administer it. It is true that the affidavit at the beginning would purport to have been made in Marion county, Indiana, but the words at the beginning are no more controlling than those at the close, where the officer designates ⁴⁷² his jurisdiction. We cannot presume that he violated the law of this state, and this we must do if we hold that the affidavit on its face purports to have been made in this state: Burns' Rev. Stats. 1894, sec. 2130. The presumption is controlling that the officer took the affidavit in the state of Ohio. But whether a notary public in Ohio has power to take affidavits is a matter of which the courts of this state cannot take judicial notice. The statute above set out provides how an affidavit taken in another state may be received and used in the courts of this state. It does not appear that any

attempt was made to comply with that statute. There is nothing to show that the notary had any power to administer oaths. As this is not one of the common-law powers of a notary, but is conferred only by legislative enactment, we cannot presume its existence. It was not error to sustain the motion to quash the writs of attachment and garnishment: Proffatt on Notaries, secs. 24, 64; Keefer v. Mason, 36 Ill. 406; Behn v. Young, 21 Ga. 207.

As the affidavit in garnishment was insufficient, there was no error in overruling appellant's motion to substitute the executor of the person, since deceased, who had been served as garnishee defendant. All the proceedings in garnishment were dependent upon a sufficient affidavit. When the affidavits in attachment and garnishment were held insufficient, no further proceedings could be had in that respect until sufficient affidavits were filed. The complaint, affidavit, and bond in attachment were filed September 5, 1893. The writ of attachment and garnishee summons were issued the same day. On the following day, an affidavit of nonresidence of the defendant was filed, and an order of publication against the defendant was entered. On October 19, 1893, the garnishee ⁴⁷⁸ defendant entered his special appearance and moved to quash the writs of attachment and garnishment, and on the second day of April, 1894, these motions were sustained, to which ruling appellant excepted, and on April 9, 1894, appellant filed its bills of exceptions to those rulings. On the twentieth day of December, 1894, appellant filed proof of publication of notice to defendant, and on the same day filed its verified motion for a nunc pro tunc entry, alleging that on the twenty-second day of March, 1894, additional affidavits in attachment and garnishment were filed with the clerk, who issued to the sheriff a writ of attachment and summons in garnishment, which were duly served on the same day and return made by the sheriff; that through the mistake or inadvertence of the clerk no minute of such filing was made by the clerk, and that said affidavits were on file and among the file papers in said cause, and asking "an order that an entry be made by the clerk of this court, nunc pro tunc, showing that said affidavit in attachment and said affidavit in garnishment were each filed with the said clerk by said plaintiff on the twenty-second day of March, 1894, and that the clerk cause notice of the pendency of this motion to be given to said defendant." This motion was overruled, as stated in a bill of exceptions, "for the reason that said additional affidavits could only have been properly filed in open court and by leave of court." To this ruling appellant excepted, and filed a bill of

exceptions. On October 21, 1895, appellant filed its verified motion to be allowed to substitute A. P. Stanton, executor and garnishee, defendant in place of John Herron, deceased, and on the twenty-fourth day of October, 1895, appellant filed its motion to review and set aside the ruling of the court sustaining the motions to quash the writs of attachment and garnishment. On the twenty-third day of November, 1896, the two motions ⁴⁷⁴ last mentioned, to substitute and review, were overruled and bills of exceptions filed. The record then recites: "And the plaintiff now elects to stand by the pleadings heretofore filed herein, and, refusing to plead further, the court does now of its own motion, dismiss this action and adjudge that the plaintiff pay all costs herein taxed at ——— dollars and ——— cents."

As the affidavits in attachment and garnishment were insufficient, it necessarily follows that no subsequent proceedings based upon these affidavits could be had. There was an error in overruling the motion for a nunc pro tunc entry, as the additional affidavits were simply filed with the clerk, and were filed while the court had under consideration the original affidavits, and which were afterward held to be insufficient by the court. There is no error in the record for which the judgment should be reversed.

Judgment affirmed.

NOTARIES PUBLIC—PRESUMPTION.—A notary public is an officer known to the common law: *Kirksey v. Bates*, 7 Port. 529; 31 Am. Dec. 722. The presumption is, that every one acting officially does his duty: *State v. Main*, 69 Conn. 123; 61 Am. St. Rep. 30. If the place where an affidavit was taken does not appear therefrom, but it does appear to have been made before a notary public, it will be presumed that he administered it in the county within which he was authorized to administer oaths: *Cox v. Stern*, 170 Ill. 442; 62 Am. St. Rep. 385.

EVIDENCE—JUDICIAL NOTICE—NOTARIES—STATUTES OF ANOTHER STATE.—The courts of a county will take judicial notice of the notaries of such county: *Cox v. Stern*, 170 Ill. 442; 62 Am. St. Rep. 385, and note; but judicial notice cannot be taken of the statutes of another state, nor of their interpretation by its courts: *Hancock Nat. Bank v. Ellis*, 166 Mass. 414; 55 Am. St. Rep. 414.

ATTACHMENT.—A SUFFICIENT AFFIDAVIT is essential to support a writ of attachment: *Beebe v. Morrell*, 76 Mich. 114; 15 Am. St. Rep. 288. It is the foundation of the jurisdiction of the court, and must be a sworn statement of such facts as the law requires as a condition precedent to the issue of the writ. Its entire omission, or the omission of any essential fact, will render all the proceedings coram non iudice: *Birchall v. Griggs*, 4 N. Dak. 305; 50 Am. St. Rep. 654.

CASES
IN THE
SUPREME COURT
OF
IOWA.

**BEEMAN v. FARMERS' PIONEER MUTUAL INSURANCE
ASSOCIATION.**

[104 IOWA, 83.]

INSURANCE—ESTOPPEL OF MUTUAL INSURANCE COMPANY BY MAKING A SECOND ASSESSMENT.—If a person has insured his property for five years, in a mutual insurance company, and part of it is destroyed by fire, but the insured has the right at any time, within the life of the policy on its face, to pay delinquent assessments and restore the policy, there is no estoppel against the company, when suit is brought upon the policy, by reason of a second assessment made after a prior one has become delinquent, and before it is paid, for it is the right, if not the duty, of the association to make it.

INSURANCE—ESTOPPEL OF MUTUAL INSURANCE COMPANY BY ACCEPTING DELINQUENT AND OVERDUE ASSESSMENTS.—If a person has insured his property for five years in a mutual insurance company, and a part of it is destroyed by fire, but he does not pay two assessments, one of which is delinquent, and the other overdue, until after the loss has occurred the acceptance of such payments is not a waiver of forfeiture of the policy, because of the delinquent assessment, where the insured has the right, under the laws of the association, to make such payments, when it is necessary to make them to restore the insurance provided for in the policy for the remainder of the period of five years, and where the association is bound to accept such payments in order to revive the policy for the remaining time it has to run.

INSURANCE—ESTOPPEL OF MUTUAL INSURANCE COMPANY BY SECOND ASSESSMENT, OR ACCEPTANCE OF PAYMENTS.—If a person insures his property in a mutual insurance company, the laws of the association and the policy providing that if the insured fails to pay his assessment within a time specified, after receiving notice thereof, his insurance shall be null and void until such assessments are paid, neither the making of a second assessment after a former one has become delinquent, nor the acceptance of a payment of both assessments after a loss has occurred, will estop the company from denying its liability on the

policy by reason of the failure of the insured to pay the prior assessment within the prescribed time.

INSURANCE—NOTICE OF ASSESSMENT BY MUTUAL INSURANCE COMPANY — SUFFICIENCY OF.—A mutual insurance company, organized under a statute which expressly prohibits such companies from receiving premiums or making dividends, is not required to give the notice called for by a statute which provides that, in every instance, where a fire insurance company takes a note for the "premium" of any policy, such company shall not declare the policy forfeited or suspended for nonpayment of the note, without first giving a prescribed notice; and the failure of a mutual company to give such a notice is not material in an action on its policy.

Action to recover on a policy of fire insurance. The company issued its policy to the plaintiff on October 30, 1893, for the term of five years, on certain property, including a frame dwelling-house, which was entirely destroyed by fire on March 11, 1896. The answer admitted the insurance and loss alleged, but showed that the defendant was a mutual insurance company that could insure no person not a member of the association; that the plaintiff became a member thereof at the time he received his policy of insurance in the way provided by the laws of the association; and that article 12 of its constitution provided as follows: "Should any member fail to pay his assessment within thirty days from the date of notice of his assessment, his insurance in this association shall be null and void until such assessments are paid; but this provision shall not affect the liability of said member for such delinquent assessments, and also for any dues and assessments which may be levied for his share of any loss which may occur while such delinquent assessment is due and unpaid, or in course of collection." The answer also showed that there was an assessment on the plaintiff's policy, payable October 1, 1895, and delinquent on November 1, 1895; that he was notified of it, by mail, on September 27, 1895, that another assessment was made on February 10, 1896, delinquent about March 15, 1896, of which notice was given; and that the assessment payable October 1, 1895, was delinquent when the loss occurred on March 11, 1896, because of which the policy was void. It was admitted that both of the assessments were paid on March 27, 1896. The plaintiff, by reply, pleaded an estoppel, based on the making of the second assessment and on the acceptance of payment of the two assessments. The court tried the cause and dismissed the petition of the plaintiff, who appealed.

Woodin & Son, for the appellant.

C. H. Mackey, for the appellee.

⁸⁵ GRANGER, J. 1. There was no estoppel because of the second assessment, for the reason that it was the right, if not the duty, of the association to make it. The building burned was but a part of the property insured, and by the terms of the contract plaintiff could at any time within the life of the policy on its face pay delinquent assessments, and ⁸⁶ restore the policy. The language of the article of the constitution of the association above quoted is: "Should any member fail to pay his assessment within thirty days from the date of the notice of his assessment, his insurance shall be null and void until such assessments are paid." The only way of making assessments delinquent was to give notice, so that the thirty days might run in which payment could be made, and avoid delinquency. The same article provides that a delinquent member shall be liable for assessments levied while he is delinquent because of a prior assessment. Thus it will be seen that the liability of the plaintiff continued as to other assessments, and the only way to escape such liability is by payment of assessments due, when, under article 14 of the constitution, he may withdraw from membership. Under such conditions there could be no estoppel because of making the assessment. There is nothing in McGowan v. Northwestern Legion of Honor, 98 Iowa, 118, to sustain such a claim.

2. Both assessments were paid on the 27th of March, 1896, which was sixteen days after the loss occurred, and it is said that acceptance of payment was a waiver of forfeiture of the policy. Numerous cases are cited to support the claim of waiver, but none of them are based on facts the same, in substance, as in this case. The payment of these assessments was necessary to restore the insurance provided for in the policy for the remainder of the period of five years. The plaintiff had the right to make the payments, and the association was bound to accept them, in order to revive the policy for the remaining time it had to run. There is not a word of testimony that the plaintiff paid under a misapprehension as to his rights because of it; not a word that he was misled by the acts or statements of the officers of the association. The record simply shows that he paid what was ⁸⁷ due from him, and the law fixed his rights because of it under the terms of his contract with the association. By the very letter of his contract, he had no insurance when the loss occurred, because of his delinquency.

3. It is said that the notices of the assessments are not suffi-

cient, as not being in conformity to chapter 210 of the acts of the eighteenth general assembly, for which reason the policy did not become void as to the insurance. It is a matter of fact that the notices did not conform to such requirements, either as to matter or form of service; but appellee contends that the chapter has no application to associations organized on the mutual plan. The following is section 1 of the chapter referred to:

"Section 1. That in every instance where a fire insurance company or association, doing business in this state, shall hereafter take a note or contract for the premium on any insurance policy, or shall hereafter take a premium note or contract which, by its terms, or by any agreement or rule of the company or association, is assessable for the premium due on the policy for which it was given, such insurance company or association shall not declare such policy forfeited, or suspended for nonpayment of such note or contract, except as hereinafter provided, anything in the policy or application to the contrary notwithstanding."

The other sections provide for a notice to be given before a forfeiture can be declared for unpaid premiums, and what the notice shall contain. The section quoted contains all the language as to what companies or associations are within the provisions of the act. The defendant association is organized under the provisions of an act of the sixteenth general assembly, chapter 103, and amendatory acts. It is organized on the plan of making mutual pledges and giving valid obligations to each other for their own insurance from loss by fire. Such associations are expressly prohibited by the act from ^{ss} receiving premiums or making dividends. Referring to the section quoted from the act of the eighteenth general assembly, it will be seen that the act applies to companies or associations having a note or contract for a premium on an insurance policy, or a premium note or contract which, by its terms, or by an agreement or rule of the company or association, is assessable for a premium due on a policy. The act has to do only with associations or companies allowed to receive premiums, and this association is not and does not do it. The obligations of the members are for assessments made on the mutual plan, which the act under which it was organized does not recognize as a premium, for it provides for such obligations, but prohibits receiving premiums. The several provisions of the statute are conclusive of the question. Neither the policy nor the laws of the association provide for a

premium, so that, as is thought by appellant, the policy is not the contract contemplated by the act.

The judgment is affirmed.

MUTUAL INSURANCE — ASSESSMENTS — ESTOPPEL.—The failure of a member of a mutual benefit association to pay an assessment, due on a certain date, on or before that date, suspends his right to claim indemnity from the association for an injury received after the assessment becomes due, and before it is paid; but forfeiture of membership in a benefit society, resulting from nonpayment of an assessment, may be waived by accepting and retaining, or by collecting and retaining, overdue assessments. Payment of an overdue assessment does not always constitute a waiver on the part of the association, or create an estoppel against it: See monographic note to *Lake v. Minnesota etc. Assn.*, 52 Am. St. Rep. 575, 576, on features of the law specially applicable to mutual or membership life or accident insurance.

MEDEARIS v. ANCHOR MUTUAL FIRE INSURANCE CO.

[104 IOWA, 88.]

INSURANCE — FIRE — TRANSFER OF POLICY — LOSS AFTER ADDITIONAL PREMIUM IS DEMANDED AND PAID—LIABILITY.—If an insurance company demands an additional premium, where an existing policy of fire insurance is about to be transferred on account of a change in the ownership of the property, and such additional premium is paid to the agent, who forwards the policy, by mail, to the company for the purpose of having it indorse thereon its consent to such transfer, the company is answerable where the property is destroyed by fire on the following day before such indorsement is made.

INSURANCE — FIRE — ESTOPPEL — PROVISIONS IN POLICY AGAINST TRANSFER OF TITLE AND WAIVER OF CONDITIONS BY AGENT.—If the ownership of insured property is changed and the insurer agrees to consent to an assignment of the policy, and to indorse such consent thereon for an advanced rate, which the agent secures and transmits to the company, with the policy, according to his instructions, the company is estopped from taking advantage of provisions in the policy which render it void in case the legal title to the property is changed, and which prohibit an agent from waiving any of the conditions of the policy.

INSTRUCTIONS—BY COLLATING FACTS.—It is proper for the court to collate the facts and to state the rule of law applicable.

INSURANCE—FIRE—ACTION ON POLICY—ADMISSIBLE EVIDENCE.—If a local insurance agent becomes the company's medium of communication with the insured, his acts are those of the company, and a conversation between such agent and the insured, as well as letters passing between such agent and the insurer, are admissible in evidence where suit is brought upon the policy.

INSURANCE—FIRE—ACTION ON POLICY—HARMLESS ERROR IN ADMISSION OF EVIDENCE.—In an action against an insurance company, it is harmless error for the insured to testify that, after a conversation with the company's agent, he believed that he was insured in the defendant company, where its liability had already become fixed by an estoppel, resting upon undisputed testimony.

Action on a policy of fire insurance. There was a judgment for the plaintiffs, and the defendants appealed.

A. W. Enoch and Sullivan & Sullivan, for the appellant.

McNett & Tisdale, for the appellees.

GRANGER, J. 1. On the sixth day of August, 1893, the defendant company issued to Medearis & Myers a policy of insurance for the sum of eight hundred dollars, on what is known as "Cascade Laundry." While the policy was in force, and about May 18, 1894, the personnel of the firm was changed by the substitution of Bowen for Myers, and the ownership of the property correspondingly changed. At this time the company held the note of Medearis & Myers for the insurance held by the firm. On the 19th of May, 1894, Medearis, in the interest of the firm of Medearis & Bowen, went to one T. H. Corrick, who was a special agent of the company, to obtain the consent of the company to change the ownership of the property to the new firm, and presented to Corrick the policy for that purpose. On the back of the policy were forms, in blank, for the indorsement of the company, and for the assignment of the policy from one firm or person to another. Corrick filled in, in writing, the blank for the assignment by Medearis & Myers to Medearis & Bowen, and Medearis signed the name of Medearis & Myers thereto, so as to complete the transaction between the firms. Corrick also filled in the blank for the consent of the company, and inclosed the policy, with a new note from Medearis & Bowen, to the company at Creston, Iowa, with the following letter, omitting unimportant parts: 1. "Herewith I hand you policy No. 6,478, Medearis & Myers, asking for transfer of same to parties whose names appear on the new note inclosed. The risk is all right, but I think I would suggest to you that the rate on this was too low, and you would have to ask for a raise of fifty cents, and I think I can secure it." 2. "I told the assured this morning I thought you would ask for two per cent or cancel policy. You use your own judgment in this matter, and I will act accordingly." Under date of May 31, 1894, Corrick received the following letter in answer to his of May 19th:

"Creston, Iowa, May 31st, 1894.

"T. H. Corrick, S. A., Ottumwa, Ia.:

"Dear Sir: Inclosed herein we hand you policy 6,478, Medearis & Myers, and would advise you that we cannot consent to assignment of this policy unless parties will agree to an advance in

rate of one-half per cent per annum. You will please secure new note made on the basis of ⁹¹ advanced rate, return same, together with the policy, when, if found satisfactory, consent to the assignment of said policy will be indorsed thereon, and the original note executed by Medearis & Myers canceled and returned to them.

Yours truly,

"GEO. J. DELMEGE,

"Secy."

On receipt of this letter Corrick went to Medearis with the policy, and surrendered the note before given for some seventy-two or seventy-six dollars, and took a new one for ninety-six dollars to meet the requirement for additional premium, and collected in cash two dollars and seventy cents, which was indorsed on the note. The policy and new note were then sent to the company at Creston the same day, June 2, 1894, by Corrick, with the following letter:

"Ottumwa, Iowa, 6-2-1894.

"Geo. J. Delmege, Secy., Creston, Iowa:

"Dear Sir: Herewith I hand you policy No. 6,478, with rate increased to two per cent, as per your instructions of recent date. I thought I could get the raise. Please charge me with \$2.70 balance due on present year's payment. Please send me some more large envelopes, unaddressed.

"With best wishes, I am, very respectfully,

"T. H. CORRICK."

On the next day, Sunday, a fire swept away a part of the city of Ottumwa, including the laundry in question. On the same day, Corrick wrote the company of the fire and that the laundry was burned, and advising the company to give the loss attention. On the next day, Monday, June 4, 1894, the company canceled the policy by a writing on the face thereof, and on the same day returned the policy and note, and the note given originally by Medearis & Myers, to Corrick, with information that the attention of the president of the company had been called to the matter, and that, as steam laundries were prohibited by the company, it would not consent to the assignment, and Corrick was directed to return the notes to the parties with a check for two dollars, in payment of pro ⁹² rata cash premium paid by them. This action is to recover on the policy.

2. The following is a provision of the policy: "It is hereby agreed that no agent or employé, or any other person or persons, other than the regular managing officer or officers of this cor-

poration, can in any manner waive, alter, or change any or either of the conditions of this contract. This contract is made and accepted subject to the above conditions." It contained the further provision that if the property be sold, or any change made in the legal title or possession, the policy should be void. In view of the facts of the case, and these provisions of the policy, the right of recovery is made to depend on a waiver of such provisions, or that the company was estopped to assert them. The court instructed the jury that the secretary of the company had power to waive the conditions of the policy, and also to consent in writing to the change of title to the property. It then gave the case to the jury on the question of waiver or estoppel, in the following instruction: "If you find from the evidence that on or about May 19, 1894, Medearis, a member of the plaintiff firm, took the policy in question to Corrick, the special agent of defendant, at Ottumwa, Iowa, and informed him that the plaintiffs had become the owners of the insured property, and requested a transfer of the policy from the firm of Medearis & Myers over to the plaintiffs; that Corrick then filled out the blank form of transfer printed on the back of the policy from the firm of Medearis & Myers to the plaintiff, and that Medearis signed the name of the plaintiffs thereto, and left the policy with said Corrick, to be by him sent to the defendant's home office at Creston for consideration and indorsement, if the transfer was approved; that a premium note was also made out and signed for the ⁹³ plaintiffs and left with said Corrick; that said Corrick, either on said day, or on or about the twenty-sixth day of May, 1894, mailed to the defendant said policy and note, and with it the letter of Corrick dated May 19, 1894 (Exhibit I), in evidence, and that the letter, policy, and note reached the defendant, and its secretary, Delmege, by due course of mail, at Creston; that said secretary wrote and sent to the said Corrick his letter of date May 31, 1894 (Exhibit X), in evidence, inclosing the policy, and that they were received by Corrick on June 1 or 2, 1894; that the said Corrick then went to the plaintiffs and took from them the new note for ninety-six dollars, in evidence, and collected from them two dollars and seventy cents as cash premium, and credited the same upon said new note; that on the same day, to wit, June 2, 1894, Corrick mailed said policy and new note at the postoffice at Ottumwa, addressed to the defendant at Creston, together with his letter dated June 2, 1894 (Exhibit V), in evidence; that the fire and destruction of plaintiffs' property took place on June 3, 1894; that plaintiffs,

from May 19, 1894, until after the fire, received no notice from defendant, or any of its agents, that defendant would not accept the risk, or would not carry the insurance for them, or would or had canceled the policy, or would treat it as forfeited by reason of the transfer or change of possession of the insured property, or that, notwithstanding the new note given and the cash paid, the policy would not be considered in force until the defendant or its secretary had actually made and signed the written consent upon the policy—then you would be justified in finding a waiver or estoppel, and in holding defendant upon the policy.” This instruction is made the basis of an assignment, and its consideration first will set at rest some of the points argued, as they are essentially involved therein.

⁹⁴ It is appellant’s idea that on the 19th of May, when the change in the firm was made, the condition of the policy was violated and the contract of insurance at an end. Not necessarily so. It is to be borne in mind that the negotiations between the new firm and the company were not with a view to new insurance, but with a view to such a consent on the part of the company as would continue the old policy. The policy, with the assignment on the back of it, was in the hands of the secretary, and also a note of the transferee, to take the place of the note of the old firm, and continue the insurance for the new firm; and it is clearly manifest that the company did not at that time intend to cancel the policy or treat it as void, until further negotiations were attempted, with a view to a higher rate of premium; and the secretary, in his letter of May 31, 1894, directed the agent, Corrick, to secure a new note on the basis of the advanced rate, and return the same, together with the policy, when, if found satisfactory, consent to the assignment of the policy would be indorsed thereon, and the original note executed by Medearis & Myers canceled and returned to them. Importance is attached by appellant to the words in the letter, “if found satisfactory,” and it is thought that they save to the company a right, for any reason, to refuse its consent. The letter, in the light of facts that may be noticed, will not bear that construction. The company then knew all the facts to govern its conduct, so far as the policy was concerned, except as to whether it could get the increased rate; and a fair construction of the letter is that, if a satisfactory note was returned, it would indorse its assent on that policy, for which purpose it was to be returned. It is not to be doubted that had the note first made by Medearis & Bowen, that accompanied the policy, been for the

amount of the last note, the consent would have been at once indorsed. ⁹⁵ The delay was only for the added premium of twenty dollars. The company, when it did conclude to treat the policy as void, left no doubt of its purpose, and leaves to us unmistakable evidence of its method of procedure. With the policy at hand, it indorsed the fact thereon, and returned what it had received, barring, perhaps, as is claimed by appellee, the two dollars and seventy cents. Before that it was keeping what it had and seeking the added premium, for no other purpose than the continuation of the policy. We can construe the letter of the secretary to Corrick in no other way than that it authorized him to secure another note, which, if given, and was satisfactory, the policy should be indorsed with the consent of the company. If so, the company is now estopped to take advantage of the provisions of the policy as to the indorsement thereon. No question whatever is made as to the sufficiency of the note. The only reason given for the cancellation is that the property insured was a laundry, which fact was at all times known. With this view, we think there is no reason for complaint as to the legal proposition involved in the instruction. There is a criticism that the court should have instructed on each point in a way asked by appellant, instead of collating the facts as they appear in the instruction, and stating the rule of law applicable. We think the method adopted by the court the better one, and well calculated to bring the case to the comprehension of the jury.

3. There is a complaint that the court erred in admitting in evidence the conversation between Medearis and Corrick, because Corrick was only a soliciting agent, with authority to look after local agents and organize certain counties, et cetera. As to this particular question, we do not think it important to determine the scope of his authority as agent. That he was an agent there is no doubt, and ⁹⁶ in this particular transaction he reported to, and received instructions from, the company, and his authority, in so far as he acted, was fully understood and recognized by the company. He was the company's medium of communication with the assured, so that his acts became those of the company, as much as if he were a general officer. The facts showing this situation appear in the former divisions of the opinion.

4. The court permitted Medearis and Bowen to testify that, after the talk with Corrick on May 19th, they believed they were insured in the defendant company. The ruling is thought to be

error. If so, it is without prejudice. The really essential facts to justify a recovery on the basis of estoppel are so few, and appear so conclusively, that a right of recovery was not a doubtful question under the law as we have determined it. The verdict really has support on the documentary proof and the testimony of defendant's witnesses.

5. It is thought that the letter of Corrick to the company, under date of May 19, 1894, being the first letter on the subject, was incompetent, and should not have been admitted. Nothing more need be said than that it was what notified the company of what was wanted, and was the basis of its communication and authority to Corrick to act, and, together with the company's letter in answer, shows its understanding and purpose in the negotiation. The same claim is made as to the final letter of Corrick to the company, in which he inclosed the policy and the note, with the added premium, which completed the agreement. There can be no doubt of the admissibility of such evidence. At the close of the testimony there was a motion by defendant for a verdict in its favor, which the court denied, and error is assigned on the ⁹⁷ ruling. The assignment presents only such questions as we have considered, and the ruling was without error.

The judgment is affirmed.

INSURANCE—ESTOPPEL BY RECEIVING PREMIUMS OR ASSESSMENTS—TRANSFER OF INSURED PROPERTY.—An insurance company, which knowingly takes a premium for a policy under conditions which render it void, is estopped from urging those conditions to release it from its contract: *Note to Mitchell v. Mississippi Home Ins. Co.*, 48 Am. St. Rep. 538. If insured property is sold or assigned with knowledge of the insurance company, it is liable for a subsequent loss, where it has assessed and collected premiums, and is estopped, by such act from denying its liability: *Highlands v. Lurgan etc. Ins. Co.*, 177 Pa. St. 566; 55 Am. St. Rep. 789 and note.

FLOETE v. BROWN.

[104 Iowa, 154.]

MECHANIC'S LIEN ATTACHES, WHEN, TO TITLE OR INTEREST ACQUIRED WHILE CONTRACT IS BEING PERFORMED.—If one in possession of land falsely represents that he owns it, or has an interest therein to which a lien can attach, and materials for improvements are furnished to him on the strength of such representations, but he afterward acquires a life estate in the land and more materials are furnished under the same contract, a lien for all of the materials attaches to the life estate.

APPEAL, WHERE PART ONLY OF RELIEF PRAYED FOR IS GRANTED.—If a court, in express words, grants a part of the relief prayed for, the effect of the judgment is to deny the other part of such relief, although there are no express words of denial. Hence, on appeal from the judgment rendered, the plaintiff may have considered his right to the relief denied.

APPEAL—QUESTIONING FACT DECLARED OR ADMITTED.—An express statement or admission by a party in a pleading, as that a will left a life estate in certain real property to a person named, cannot be questioned by him on appeal.

LIENS—LESSEE AND MECHANIC—PRIORITY.—The lien of a lessee of a life estate is superior to a mechanic's lien for materials furnished prior to the lease, where the lease was made before the statement of the mechanic's lien was filed and after the expiration of the time during which the statute would protect a mechanic's lien without a statement, and where the lessee had no actual notice of such lien.

ASSIGNMENT OF LEASE—NOTICE OF MECHANIC'S LIEN—PROTECTION OF ASSIGNEE.—If one takes a lease of a life estate without actual notice of a mechanic's lien for materials furnished, and assigns the lease for value, the lien of the leasehold interest, as to him, is prior to the mechanic's lien, and the assignee is protected, as the assignor would be, notwithstanding any actual knowledge the assignee may have had.

Action on a note and account, and to establish a mechanic's lien. The plaintiff obtained judgment on the note and account, but only partial relief with respect to the lien, and appealed from the judgment and decree rendered against him.

Cory & Bemis, for the appellant.

Carr & Parker, and Richardson, Buck & Kirkpatrick, for the appellees.

¹⁵³ **GRANGER, J.** 1. John Brown died, testate, July 4, 1891, in Illinois, leaving as a part of his estate, a quarter section of land in Clay county, Iowa. He left several children surviving, and among them Vincent D. Brown. In the spring of 1891, and before the death of his father, Vincent D. Brown became a tenant of the land in Clay ¹⁵⁶ county, and was in such occupancy when his father died. The right of Vincent D. under the lease was only from year to year. The will of John Brown gave to Vincent D. a life estate in the land, so that after July 4, 1891, his estate was one for life. In April, 1891, without the knowledge of John Brown, Vincent D. contracted with the plaintiff for lumber to be used in erecting buildings on the land, and the lumber was delivered and so used. Most, if not all, of the lumber, had been furnished before the death of John Brown. There is some dispute as to where the lumber was used, it being appellant's claim that a part of it was used in the house;

but the court found, and we think correctly, that it was used only in the barn and hogpen. Appellant, in his petition, sought to establish his lien on the real estate on which the buildings are situated. The defendants are quite numerous, including the widow and heirs at law of John Brown, and also the John Paul Lumber Company, F. H. Helsell, and the Bank of Sioux Rapids. The interest of Helsell and the bank is because of a lease executed by Vincent D. Brown in November, 1892, to Helsell to secure a loan of one thousand dollars from the bank. On the fifth day of April, 1894, a balance of the one thousand dollar claim was paid by A. H. Brown, and the lease was assigned to him by Helsell, and he (Helsell) also quitclaimed to A. H. Brown his interest in the land. On the same day, Vincent D. Brown and wife, by deed, conveyed their interest in the land to A. H. Brown. It thus appears that from and after April 5, 1894, A. H. Brown was the owner of the life estate, by a conveyance from Vincent D. Brown and wife, and also the owner of the leasehold interest of Helsell, which included the interest of the bank. This suit was commenced August 5, 1893, and before A. H. Brown obtained the title from Vincent D. or the interest of Helsell; and hence he took from them with knowledge ¹⁵⁷ of plaintiff's claim, but would be protected in so far as his grantor would be protected. The statement for the mechanic's lien was filed August 3, 1893. The cause is continued as to the John Paul Lumber Company, so that the company does not appear in this court. The district court, so far as the lien concerned, sustained it as to the barn and hogpen, and denied it in other respects, and it is mainly because of a refusal to sustain it as to the life estate of Vincent D. Brown that the appeal is prosecuted.

2. The answer of the defendants admits the right of plaintiff to a lien upon the buildings in which the lumber was used, and they do not resist the establishment of such a lien; but the right to a lien on the land is denied by them, and the contention comes to this: Are the facts such that had Vincent D. Brown retained his life interest in the land, the lien of plaintiff would have attached thereto? For the present we leave out of consideration how the lien, if it would attach, would be affected by the leasehold interest of Helsell that was assigned to A. H. Brown. The sale by Vincent D. to A. H. Brown was in 1894, long after the material was furnished and the life estate was acquired, so that the lien had attached so far as it would, of which A. H. Brown was required to take notice in his purchase from Vincent D. The equities of this case speak loudly for the plaintiff, but

this should not lead to an erroneous announcement of the law. The facts are, we think, beyond serious dispute, that when the contract was made between plaintiff and Vincent D. Brown, both supposed that he (Vincent) had the right to make the improvement on the land; that part of the material was furnished before and part after the life estate was acquired; that plaintiff did suppose, and Vincent D. had reason to suppose, at least after he had his life estate, that the lumber was furnished so that the lien would be upon his (Vincent's) interest, be ¹⁵⁸ it greater or less. It does not appear that the contract was for a specific amount of lumber to be delivered at a specified time, but it seems that the period of its delivery was from April 15 to December 10, 1891, quite a proportion being delivered after the life estate was acquired. Plaintiff states, and, we think, truthfully, that when the contract was made for the lumber, Vincent told him that he owned the farm. It may be doubted if he meant more than that he was in possession, expecting the title, at least, to the extent of a life estate. In view of these facts, we do not regard the legal proposition as doubtful that, as between plaintiff and Vincent D., the lien should attach to the life estate, which he had when he took, in part at least, the fruits of his contract. It was but one contract and one performance. We do not find that the precise question has ever been determined. The statute does not seem to be explicit in this particular. Appellees concede, in argument, that the lien attaches to "such interest as the owner had at the time of entering into the contract and the furnishing of the material." We need not express an opinion as to the correctness of such a rule, for, if correct, it is against the thought that it attaches only to the interest at the time the contract is made, and favors our conclusion; but we may say that where a party is led to believe that one has a title or interest, to which the lien will attach, and he has not, but obtains it while the contract is being performed, the lien does attach. Of such a rule we have no doubt.

3. It is thought by appellees that the appeal is not from that part of the judgment, so that the question we have considered is not involved in the appeal. The prayer of the petition is in part that a lien may be established against said land and the buildings according to law, and concludes with a prayer for such other and further relief as may be adjudged equitable. The effect of the judgment was to deny all ¹⁵⁹ relief against the land. There are no express words of denial, but there are express words of the relief granted, which would operate to deny what is not

expressed, and that is, in legal significance, a judgment of denial. The notice of appeal is that plaintiff appeals from the judgment and decree rendered against him. We think that wherein the court either expressed or by legal inference denied relief asked by plaintiff, it was a judgment against him; so that, on appeal, generally, from a judgment against him, he may have such questions considered.

4. It is said that the devise in the will is too indefinite to vest a life estate in the particular land in question. We think that question is definitely settled, for the purpose of the case, by the answer of the defendants. It is therein expressly stated that the will left a life estate in said real estate to Vincent D. Brown.

5. With the life estate affected by the mechanic's lien, we should settle the question of priority between plaintiff and A. H. Brown, in so far as his leasehold interest is concerned, that he obtained by assignment from Helsell. The lien of this lease attached in November, 1892, which was after the life estate attached, and before the statement for the mechanic's lien was filed, and after the period in which the statute protects such liens without the statement. Helsell took his lease without actual notice of the mechanic's lien, and hence he is protected, and the lien of the leasehold interest, as to Helsell, is prior to the mechanic's lien. A. H. Brown is the assignee of the lease, for value, and, as we understand, is protected as Helsell would be, notwithstanding any actual knowledge he may have had. This rule is familiar. We think the judgment should be so modified as that the plaintiff's lien will attach to the life estate, ¹⁰⁰ subject, however, to the lien of A. H. Brown by virtue of the lease obtained from Helsell.

The main contention in the case has been as to the right of the plaintiff to a lien other than on the buildings. The costs, in other respects, are but a small proportion. The defendants Helsell and the Sioux Rapids Bank are entitled to their costs, and as to the plaintiff and other defendants who have answered, and are in this court, the costs will be taxed in both courts, one-fourth to the plaintiff, and the remainder to the defendants.

With the modification of the judgment as suggested, it will stand affirmed.

MECHANIC'S LIEN — AFTER-ACQUIRED TITLE. — A mechanic's lien on an equitable estate attaches to an after-acquired legal title the moment it vests in the same person: *Lyon v. McGuff*.

fey, 4 Pa. St. 126; 45 Am. Dec. 675, and extended note thereto, on interests and estates affected by mechanics' liens, showing that a life estate may be subject to such a lien. See, also, Paulsen v. Mans-kee, 126 Ill. 72; 9 Am. St. Rep. 532.

LIENS—PRIORITY.—A lien existing at "the inception" of a mechanic's lien is protected, but a contract lien created after "the inception" of the mechanic's lien is subordinate thereto: Oriental Hotel Co. v. Griffiths, 88 Tex. 574; 53 Am. St. Rep. 790.

THE ASSIGNMENT OF LEASES, and the respective rights and liabilities of lessor, assignee, and assignor thereafter, is the subject of a monographic note to Washington Natural Gas Co. v. Johnson, 10 Am. St. Rep. 557-565.

CEDAR FALLS v. HANSEN.

[104 IOWA, 189.]

MUNICIPAL CORPORATIONS—RIGHT OF OWNER TO BRING HIS LOT TO GRADE—SURFACE WATER.—The owner of a lot in a city may exercise his right to bring it to grade, although he changes the flow of surface water thereon to lots owned by other persons.

MUNICIPAL CORPORATIONS — ESTOPPEL OF LOT-OWNER TO CHANGE FLOW OF SURFACE WATER—GRADING.—If a city constructs a ditch, which conveys water over a lot therein, the owner thereof does not, by acquiescing in such construction, estop himself from obstructing the flow of water in the ditch by raising his lot to grade.

Action to enjoin the defendant from obstructing the flow of water. He owned lots 6, 7, and 8, in block 5, of Taylor's addition to the city of Cedar Falls. They fronted on State street, which ran north and south. Lot No. 8 was the one lying north and it bordered on Thirteenth street, which ran east and west. Lots numbered 7 and 6 were south of No. 8, and in the order named. It appeared from the petition that the defendant had long used and occupied a house on lot No. 8, but that, later on, he had moved the house to lot 6, and had placed a foundation under it, and was about to bring the lot to a level with the street in front of it. It also appeared that there was a natural depression across lot 6, through which water had always flowed from higher land, lying to the north and west of the lots, to lower lands south of them; that the land on the north and west, drained by the depression, was about forty acres; that the defendant had placed his house directly in the path of the water course; and that its completion would obstruct the flow of the water, and turn it back into the street, and upon the premises of other lotowners, thereby creating a public and private nuisance, to the injury of the plaintiff and

others. It was sought, by this action, to enjoin the defendant from making the obstruction. Most of the averments of the petition were admitted by the answer, but the conclusions pleaded were denied. The petition was dismissed, and the plaintiff appealed.

H. C. Hemenway, for the appellant.

Alfred Grundy, for the appellee.

¹⁹¹ GRANGER, J. It will be well to somewhat particularize the facts at the outset. It seems that north and west of the lots of defendant, many years ago, was a tract of some forty acres of land on which was a low place or basin that, because of surface water coming thereon from adjacent lands, made a pond, the overflow from which ran down across the lots of defendant, because of the natural lay of the ground. This natural passageway was not like the bed of a stream with defined banks, but such a hollow as to be followed by water, when flowing from the tract described. It may be said that, beyond question, it was surface water flowing only at times. This hollow or passageway for the water grew narrower in going south, till, on lot 6, it was comparatively narrow. The pond referred to we understand to have been filled by the city, but surface water still flows from the tract of land. The city, in 1871 and 1872, made improvements in this section, and in so doing made a ditch along the west side of lots 7 and 8, and turned the same in on to lot 6 for a short distance, so that the water passed from the ditch on lot 6 into the hollow or passageway we have described. Since the ditch was constructed the water has passed through it, and not across lots 7 and 8, except at times of the heaviest storms. The defendant has owned and occupied lots 7 and 8 since about 1871, and has owned lot 6 since 1884. The ditch constructed along the west side of the lots has been enlarged and kept in repair by the city since its construction. Since the ditch was made defendant has filled lots 7 and 8, and they have been used for gardening and a place for residence, and it is ¹⁹² the house thereon, in which defendant lived, that is now being placed on lot 6.

It is appellant's claim first "that the drainage channel of the basin constituted a watercourse, which neither the city nor any person may interrupt or obstruct to the damage of any other person who objects thereto." In support of this claim we are especially referred to Angel on Watercourses, sixth edition, sections 108a-108s, where the subject of ancient watercourses

is considered. This court in *Livingston v. McDonald*, 21 Iowa, 160, 89 Am. Dec. 563, considered the question of surface water, and as we understand, followed the rule cited in *Angel on Watercourses*. The subject there, as here, was that of surface water. The rule of the *Livingston* case is that the owner of the higher land has no right to collect the surface water into a ditch or drain in increased quantity, or in a manner different from the natural flow, and discharge it upon the land of another, even though it be done in the course of the improvement and use of his farm; but the owner of such higher land may, for the proper use of his farm, so drain his land of surface water as to divert it from going on to the lower land owned by another. These rules are well established. It is, however, said in that case that the rule is not laid down as applicable to town or city property. The later case, in this state, of *Freburg v. Davenport*, 63 Iowa, 119, 50 Am. Rep. 737, deals with the rights of the city in the improvement of streets and abutting property owners as to surface water. It is true that the case does not present the precise question involved in this case, but it does present one as to the liability of the city for damage for negligence of the city in failing to provide sufficient outlets for surface water. Incidentally, the question of the rights of the city to bring its streets to grade, and the abutting property owner to bring his lot to grade, are involved and considered, with the conclusion that both have the right, and damage was denied ¹⁹³ to the lotowner because of water being diverted from its natural course by the street improvement, because the city had the right to presume that the owner would bring his lot to grade, and thus protect himself from damages. The case plainly recognizes the rule that the city may, in bringing its street to grade, divert surface water from its natural course without liability for damage to abutting property not at grade. The recent case of *Knostman etc. Furniture Co. v. Davenport*, 99 Iowa, 589, is in some respects applicable, and is in line with the former cases. As facts in this case, we should have stated that the grade of State street had been established, and the lot in question was below it. The grading complained of was to improve the lot and bring it to grade. It is the law, then, that the city had the right to bring its street to grade, and in so doing it might discharge surface water on the lot, without liability, because defendant had not brought his lot to grade, as the city had a right to presume he would. It is to be remembered that the city in the improvement of its street,

changed or diverted the water from its natural course across lots 7 and 8 and a part of lot 6, and it is now in the position of asserting a right for itself to change the course of the water on defendant's land, but denying to him the right to obstruct it. Conceding that the rights of the city and the individual may not always be the same, it still remains that the city may not divert water to its liking, and say to the defendant, "You cannot improve your lot so as to interfere with the flow of water as it now is." It is the established right of the city, in the improvement of its streets, to turn surface water, even from its natural course, and owners of lots below grade cannot complain, because of their right to bring their lots to grade for protection. The same right must certainly belong to the lotowner, that is, he may exercise the right to bring his lot to grade; and, however these changed conditions may ¹⁸⁴ affect the flow of surface water, he is not responsible for consequences, nor can he, to avoid consequences, be denied the right to improve and enjoy his property. The situation is within the rule, so often stated, that surface water is a common enemy against which all may contend. It would not do to apply to cities the general rule applicable to rural districts as to surface water. Such a rule is founded largely on the proper enjoyment of lands, with their natural formation, while in cities the use and enjoyment of real property is made to depend very much on changes prescribed by the constituted authorities. Municipal regulations necessitate the bringing down of higher land, and the bringing up of lower land, to grade. Appellant places some stress upon the rule as to easements, but we cannot see how it can base a right on such a claim. It is thought that the acquiescence of defendant in the construction of the ditch, and taking the advantage of it, should now prevent him from obstructing the flow of the water as fixed by the ditch and the regular channel. He could do nothing else than accept it. It was, as we have said, the city's right, so far as the street was concerned, to change the flow of surface water. The acquiescence was a legal necessity; the judgment must stand.

Affirmed.

RAISING LOT TO GRADE.—SURFACE WATER is a common enemy which a lotowner has a right to fight off from his own land by raising his lot to grade: *Weis v. Madison*, 75 Ind. 241; 39 Am. Rep. 135.

MORAN v. MORAN

[104 Iowa, 216.]

WILLS—STATUTE OF FRAUDS.—It is a matter of serious doubt whether the statute of frauds was ever intended to apply to testamentary dispositions of property.

EVIDENCE—INGRAFTING TRUST ON WILL BY PAROL.—Under a statutory provision which makes a writing essential to the validity of a will, parol evidence is not admissible to show that a testator, in making an absolute devise, intended that the devisee should hold the property in trust for others, although the devisee, by a pleading in probate proceedings, acknowledges the trust in writing and defines its extent.

EVIDENCE—INGRAFTING TRUST ON WILL BY PAROL.—The very purpose of requiring wills to be in writing would be wholly defeated if courts of equity were allowed to ingraft upon their provisions such parol trusts as seemed probably to have existed in the mind of the testator.

DEVISE—TRUST—EFFECT OF RELINQUISHMENT OF DEVISE AND FAILURE OF TRUST.—If an absolute devisee relinquishes all claims under the will, except such as may come from a trust thereunder, the devise must fail if no trust is shown, and the property becomes a part of the residuary estate, to be disposed of as if no devise of it had been attempted.

CHARITABLE USES OR TRUSTS—UPHOLDING OF—BEQUESTS TO SISTERS OF CHARITY.—It is competent for a testator to bestow a charity on a person or institution to be chosen by a trustee or executor, and such a bequest will be upheld; but bequests are not limited to a charitable use or purpose, and a bequest to the sisters of charity, if certain, is valid, though it contains no element of a charitable use.

CHARITABLE USES OR TRUSTS—WHEN VOID FOR UNCERTAINTY.—A bequest of money "to be divided among the sisters of charity," is void for uncertainty where there is no limitation as to locality, state, or nation, and no discretion vested in a trustee.

LEGACIES—UPHOLDING OF BEQUESTS FOR A LAWFUL PURPOSE.—A bequest for a known, lawful purpose, should, where the power of execution is prescribed and available, never fail for want of a name or a legal classification, unless it is in obedience to a positive rule of law.

LEGACIES—BEQUEST FOR MASSES IS VALID—PRIVATE TRUST.—A bequest to a Catholic priest, who is the pastor of a particular church, "that masses may be said for me," is not a charity, but the bequest is, nevertheless, valid, and creates a valid private trust, if the priest accepts the money.

LEGACIES—EFFECT OF INOPERATIVE BEQUEST.—If a bequest is inoperative, the property affected by it passes to the residuary estate.

Proceeding asking for the construction of the will of John Moran, deceased. The testator died without issue and unmarried. He left surviving him William D. and Michael and Mary Moran, as brothers and sister, who, in the absence of the will, would inherit the estate. The testator made an absolute devise of his farm to his nephew, William Moran; and, among

other legacies, made a bequest of money "to be divided among the sisters of charity." He also made a bequest to a Catholic priest, that masses might be said for the testator's soul. The nephew, William Moran, as executor, offered the will for probate, but objections were filed thereto, on the ground, among others, that the subscribing witnesses were legatees thereunder. In his answer to the objections, William Moran, who was also a subscribing witness to the will, expressly denied that he had any interest in any devise or legacy provided by the will, and alleged that the devise of the farm to him was in trust, only, for the children of his sister, Bridget Tiernan, which trust was declared by parol by the testator, and by a parol agreement on his part to accept the trust. Another subscribing witness, William Toomey, who was also a legatee under the will, also filed his written relinquishment of any provisions of the will in his favor, and upon a hearing the will was admitted to probate. William Moran then instituted this proceeding against William D. Moran, one of the legatees, and all other parties in interest, as defendants, and asked the court to determine what provisions of the will were valid and should be executed. The defendant, William D. Moran, answered that the bequest for masses, and also the one to the sisters of charity, were void. He also answered that the devise of the farm to William Moran could not be established and treated as a trust in favor of the children of Bridget Tiernan, but that because of the relinquishment by William Moran, the same became a part of the estate, for distribution among the heirs at law as if the testator had died intestate. The bequests for masses and to the sisters of charity were pronounced valid, and the devise of the farm to William Moran was considered to be in trust for the children of Bridget Tiernan. The defendant William D. Moran appealed.

Bobt. S. Barr and Shortley & Harpel, for the appellant.

White & Clarke, for the appellees.

218 GRANGER, J. 1. We first notice the question whether or not what appears by the terms of the will to be an absolute devise to William Moran of the farm can be shown by parol evidence to be in trust for the children of Bridget Tiernan. It appears that the will was drawn by Father Malone, a Catholic priest. There were present, other than the priest and the testator, William Moran and William Toomey, who were subscribing witnesses. The situation will be best seen by quoting from the record a little of the evidence. Father Malone testified:

"When I sat down, I told him now we were ready to write anything he wanted us to write; and he says to me, the very first thing, 'I want Billy, here, to take that farm, and give the benefit to those children.' I says, 'What children do you mean?' and he says, 'The Tiernan children.' We didn't understand how he wanted the title fixed—whether he wanted it left to the Tiernan children by will, or leave it to William in trust. Q. ²¹⁹ What was said by him? What did he say in reference to that? A. I stopped and hesitated quite a bit, because I didn't want to disturb the man any more than was necessary. I remember I said: 'John, you don't fix the title to that property, and, if we write it down the way you say it would be very vague. Can't you make it clearer?' He says: 'Billy can explain it to you, if you want it.' And it seemed to worry him when I said that. I says: 'Let us drop that out until we write the rest, and leave that to the last.' When we had written the other items, I says: 'I believe we have written all but that.' He says: 'I want it left to Billy, simply.' I wrote it down, and says: 'Is that what you want?' He says: 'Yes, sir; that is it exactly. Billy will know what to do with the children.' In order to get more information without questioning, I says: 'That is a very good idea. Some of the children are very young, and they might squander it.' He says: 'That is it, exactly. Some of them might not be as good as they might be, and, if they got any part of this property, they might squander it; and, in order to prevent it, I want him to have that title, so that he can discriminate among them as he sees fit.' And then he made the remark that it would prevent litigation and keep it out of court." William Moran, the devisee, testified as follows: "He said he wanted to leave it to these children, for their use and benefit, and he wanted to put it in my name, so there would be no costs or court expense. For that reason it was put as it was." "I asked him if he had any particular choice, that he should leave more to one than to others. He said, 'No'; if they were all good, he wanted them to get equal amounts, and, if there was any poor ones (that is, ones of bad character), he didn't want them to have anything. I consented I would carry out his instructions if I was permitted to do so."

²²⁰ While there is a claim otherwise, we think it clearly appears, by parol evidence, that the testator's intention was to devise the farm to Moran, only for the use and benefit of the Tiernan children. With this expression of opinion as to the sufficiency of the evidence if admissible, we may better con-

sider the legal proposition whether, under the provisions of our statute, such evidence is competent to show the fact. It will be remembered that the devise is absolute to Moran of the farm, in the following language: "I will to William Moran, my nephew, son of my sister, Mary, my farm." Can the devise so made, by evidence like the above, be so affected, changed, or modified as to give it the effect of a devise in trust to Moran for the use and benefit of said children? Upon this question the parties are in very earnest contention; appellant saying it cannot, because of the following provision of the code of 1873, in force at the time of the execution of the will, and of the trial of the case in the district court:

"Sec. 1934. Declarations, or creations of trusts or powers, in relation to real estate, must be executed in the same manner as deeds of conveyance; but this provision does not apply to trusts resulting from the operation or construction of law."

"Sec. 2326. All . . . will, to be valid, must be in writing, witnessed by two competent witnesses and signed by the testator, or by some person in his presence, and by his express direction."

Reliance is also placed on the statute of frauds.

Appellees maintain that the devise can be so affected, and state two propositions, either of which is said to be sufficient to support the conclusion, first, that "the case is not within the statute of frauds or of wills," and "that it has been held universally, in such cases as the one at bar, that the statutes are inapplicable and are not to be invoked to accomplish a ²²¹ fraud." A little sifting out of claims that we are disposed to disregard will tend to simplify the disposition of the question. The statute of frauds seems, by its express language, to prescribe a rule of evidence applicable to contracts; and, without any holding on the question, we may say that it is a matter of serious doubt if it was ever intended to apply to testamentary dispositions of real estate. Section 1934 of the code of 1873, providing that "declarations or creations of trusts or powers in relation to real estate must be executed in the same manner as deeds of conveyance," is a section of a chapter on real estate, the purport of which seems to be as to transactions other than those of a testamentary nature; and, without placing any construction on the scope of either of those statutory provisions, they may be understood as in no way influencing our conclusion on this question. The statutory law that we do regard as applicable and controlling is that "Of Wills and Letters of Administration," wherein it is provided who may dis-

pose of his property by will, and how it shall be done. After specifying the circumstances under which personal property may be disposed of by verbal will is the provision we have quoted above, that "all other wills, to be valid, must be in writing, witnessed by two competent witnesses and signed by the testator, or by some person in his presence, and by his express direction." This provision as to wills being in writing is a general, if not a universal, statutory requirement in this country; and hence judicial determinations and general rules of construction may prove valuable aids to a conclusion. Looking at the question solely in the light of our statutory language, if we permit the evidence in this case to ingraft on the will the modification sought, the effect will be to change the absolute devise to William Moran of the farm into a devise as follows: "I will to William Moran my farm, in trust ²²² for the children of Bridget Tiernan." The provision established by oral evidence, and without which it could not be even thought of, entirely destroys the devise manifest from the language of the will, and makes another. Can such a devise properly be said to be in writing? From an extended examination of authorities, we are led to regard the rule as universal that the plain effect of the language as used in the will is not to be varied by external proof of what effect was really intended. Parol evidence may, indeed, be resorted to for the purpose of making intelligible in the will that which cannot without its aid be understood, or resolving a doubtful interpretation; but if the language of the will, in point of legal construction, requires one interpretation, and can be understood in that sense, evidence of intention cannot be adduced to give it another and different interpretation. Such is the rule as stated in Schouler on Wills, section 587. Mr. Redfield, in his work on Law of Wills, volume 3, page 59, in a connection to make the language entirely applicable, uses this language: "The very purpose of requiring wills to be in writing would be wholly defeated if courts of equity were allowed to ingraft upon their provisions such parol trusts as seemed probably to have existed in the mind of the testator." It is to be said that such a rule has general support in authority, but we are cited to a larger number of cases said to sustain the rule of appellee's contention. We cannot agree with appellees in the claim that they apply to the facts of this case. That there are authorities to the effect that where a testator, because of the fraud of a devisee, is induced to make the devise on the representation by the devisee that he will take the

devise in trust for another, who was the real object of his bounty, equity will enforce the trust, is not to be questioned: See *Hooker v. Axford*, 33 Mich. 454; *Hoge v. Hoge*, 1 Watts, 216; 26 Am. Dec. 52; *Dowd v. Tucker*, 41 Conn. ²²³ 197; *Williams v. Vreeland*, 29 N. J. Eq. 417; *Tee v. Ferris*, 2 Kay & J. 357. Numerous other cases could be cited, but it is not important to do so. In these cases—and, if there are exceptions, we have not noticed them—equity has interfered to enforce a trust on the ground of fraud, in the practice of which the devisee has, by his acts or silence, prevented the testator from, or led him to avoid, making provisions in his will which he intended; and the cases cited were not for the construction of the wills, but to declare a trust based on the fraudulent acts by which the making of the will, as intended, was prevented. The cases do not attempt to change the wills, or to construe them, but to fix obligations because of the acts of the devisee. In this case there is no claim of fraud, nor that the devisee in any way induced the devise. The will was written just as the testator desired it. He wanted Moran to have the title, and he gave it to him. He also wanted Moran to hold and use the property for specified purposes, and neglected to make any provision for it in his will, and that is what the authorities say cannot be ingrafted onto the will by oral proof. If, in this case, we sustain the trust, we must say that the testator intended by his will to create the trust, while we know at its making, and all present knew, that he did not so intend, but he did intend verbally to create the trust. In fact, all was done as he intended to do it, but not in a way to give his intentions effect. Assuming that he knew the law, as we must, he purposely departed from its requirement to make the devise in writing. It is also to be said that the objector, who is a brother of the deceased, and urges the invalidity of the devise, had no part in, and, so far as the record discloses, had no knowledge of, the making of the will. He is in no way in fault that the will does not express the intention shown by the verbal proof. In this respect the case is unlike those in which a trust is sustained. We think the cases all ²²⁴ expressly or impliedly guard the exercise of authority to maintain or enforce such a trust by the fact that the testator would have done what the trust is maintained for, had not fraud prevented it. That is not true of this case. It is also said by appellees that, if further writing is necessary to prove the trust, it is found in the answer of William Moran in the probate proceedings. in

which he acknowledged the trust and defined its extent. Mr. Moran is to be commended for his unselfish and faithful course in the matter, by declining so generous a bounty at the expense of a breach of confidence, but he cannot, by his writing, do what the testator should have done. The conditions of the will were fixed by the expressed intentions of the testator in the way provided by law. Inasmuch as William Moran has relinquished all claims under the will, except such as should come from the trust sought to be shown, and as no trust can be sustained, the devise of the farm must fail; and it becomes a part of the residuary estate, to be disposed of as if no devise of it had been attempted.

2. Objection is made to the provision of the will in favor of the sisters of charity, which is in these words: "I will and bequeath, to be divided among the sisters of charity by William Toomey, William Moran, and Rev. H. V. Malone, five hundred dollars." It is said that the bequest is void because of uncertainty, and we think the objection must be sustained. We do not question the rule that it is competent for a testator to bestow a charity on a person or institution to be chosen by a trustee or executor, and that such bequests will be upheld. It is a historical fact, of which we may take notice, that sisters of charity are general throughout the state and country. It appears in evidence that they constitute a charitable sisterhood of the Catholic church. The provision of the will is, that the bequest is to be "divided among the sisters of charity." If the bequest should be sustained, ²²⁵ how would the trustees execute it? No one would say that it should be divided among all of them, for such, in reason, could not have been the intention. There is no limitation as to locality, state, or nation. We infer that appellees think the trustees may select to whom the bequest shall be given. The will does not so provide. In *Lepage v. McNamara*, 5 Iowa, 124, with a very similar question under consideration, as to the legal proposition it is said: "If there is such uncertainty as that it cannot be known who is to take as beneficiary, the trust is void; and the heirs, by operation of law, will take the estate, stripped of the trust." That rule is decisive of the question. There is no attempt in argument to say who the beneficiary of this bequest is, in language less uncertain than the will itself. There is no contention that the will is sufficiently specific, if the trustees may not use a discretion, and no such right is granted. The bequest is void for uncertainty.

3. It is also urged that the provision of the will, in order that masses might be said for him, is void. The bequest is as follows: "I will and bequeath to the Catholic priest who may be pastor of Beaver Catholic Church when this will shall be executed three hundred dollars, that masses may be said for me." The testator was a member of Beaver Catholic Church. It had a definite and known location. It is not to be doubted that the words of the bequest "when this will shall be executed" mean when the will should be carried into effect. An objection to the bequest is that it contained no element of a charitable use. That is true, but bequests are not limited to such purposes. We must assume that the bequest was inspired by his religious convictions as to duty in the way of furthering his hopes and purposes for security and happiness hereafter. Promises and pledges made in life for the support of religious observances to the same end are usual, and supported by undoubted authority. Why is not a bequest to secure such observance after one's death, for the same purposes, valid? It is said that "the soul of the deceased being a use not recognized in law, and the donor and use being the same, and not in life, the bequest should be held void." It is thought that *Russell v. Allen*, 107 U. S. 163, sustains appellant's view, but a careful examination of the case shows otherwise. The case has to do with charitable bequests, and where they are void because the object of the charity is not so defined as that it may be known. We have in this case recognized the rule of that case in the respect stated; but, as we have said, this bequest is not a charity. It is an expenditure directed by the testator for a service promised to him, and the fact that, when the service is to be rendered, he will not be living, so as to be a beneficiary in this life, is a matter of no concern to the courts. His soul's welfare in the hereafter is a matter of his personal concern, for which, when not contravening public policy, he may act as his judgment and beliefs shall direct. It is not the province of the courts to inquire as to the soundness or reasonableness of religious beliefs, but to respect all such and the ceremonies of their observance, wherein they do not militate against the public peace and security. The provision is little different from one for the erection of a monument after his death, or the doing of any other act that he might desire, not intended for the benefit of anyone living, but which, if living, he might lawfully do. Such bequests, if made so definitely as that the intent may be known and carried into effect, are valid. In a

somewhat recent case in Alabama (*Festorazzi v. St. Joseph's Catholic Church*, 104 Ala. 327, 53 Am. St. Rep. 48), the legal effect of such a bequest is considered. The bequest there considered was in these words: "I give and bequeath to the Roman Catholic Church of St. Joseph, in the city of Mobile, the sum of two thousand dollars, ²²⁷ to be used in solemn mass for the repose of my soul." The case treats the bequest as a private trust, which, we think, is the proper class in which to place such a bequest. In holding the bequest invalid as such a trust, it is said: "It is not valid as a private trust, for the want of a living beneficiary. A trust in form, with no one to enjoy or enforce the use, is no trust." The latter proposition is not to be doubted. The former we need not consider, for that branch of the case is made to turn on the fact that "there is no imaginable being possessing power to enforce the use declared in the bequest." The statement as to such a bequest being void for want of a living beneficiary is not argued. It will be noticed that in that bequest the trustee is the church, because of which it is said there is no imaginable person to enforce the trust. That is not true of this case. The priest of the church designated, at a specified time, is made the person to execute the trust; and, when he accepts the money, he becomes responsible to the court for the proper discharge of his duties as trustee.

The cases on this subject are not in accord. Some of the courts have been slow to get away from the rule of the English cases in which, under their amalgamated condition of church and state, such bequests and devises were held void, as superstitious uses or creating perpetuities. In *Festorazzi v. St. Joseph's Catholic Church*, 104 Ala. 327, 53 Am. St. Rep. 48, it is said: "Under our political institutions, which maintained and enforced absolute separation of church and state, and the utmost freedom of religious thought and action, there is no place for the English doctrine of superstitious uses." Similar language has been repeatedly used by the courts in this country. In *Gilman v. McArdle*, 99 N. Y. 451, 52 Am. Rep. 41, the question was to the effect of an agreement by which money was accepted during the lifetime of the decedent, to be applied to certain purposes, and the residue to be expended for Roman Catholic masses, ²²⁸ to be said for the repose of her soul, and that of her husband. The court declined to definitely settle the question as to the application of the residue, for masses, but the opinion contains a discussion of bequests for such purposes, incidental to other questions, that is worthy of notice. The lower court in that case had held that, as to the surplus to be

use for masses, it was held by one as mere agent, whose authority was revocable, and that no valid trust had been created; that there was nothing illegal or contrary to public policy in the purpose to which the money was intended to be applied, but that, as a trust, it was void for want of a beneficiary who could enforce it, both of the persons for whose benefit the masses were to be solemnized being dead. The same court expressed the opinion that the disposition of such surplus would have created a valid trust if contained in a will. This holding and language of the court is made the basis on which the court of appeals based its discussion and conclusion. The argument is clear to the effect that there is no such distinction in law as that an agreement during life, for the expenditure of money for masses after death, is invalid, but that a testamentary provision to that effect would be valid. The two methods are unmistakably made of equal validity, for the court, after specifying the facts, says: "Such a contract could be enforced by the legal representatives of the promisee, and, in case of a refusal to perform, they could recover the consideration paid. It certainly must be in the power of a person to provide, either by will or contract, for matters of this description, and I can see no legal reason why he should be confined to a testamentary direction." This conclusion follows some argumentative language that gives to it an added value, and we quote it as follows: "But in the case before us, even if it should be conceded that the agreement under which the defendant received the money could not be sustained strictly as a trust, on the ²²⁰ ground of the want of a beneficiary to enforce it, it would not follow that it was of no effect whatever. As a trust, the same objection, if valid, existed to the undertaking to apply the fund to defraying the funeral expenses of the deceased and her husband, and to the erection of a monument to their memories, but it would be a great abridgement of the rights of property to deny to any person the power, in his lifetime, to enter into a contract to be performed after his death by another person, to do or procure to be done any act not objectionable as against any rule of law, morals, or public policy, and to pay the consideration for the performance of such a contract. It appears in this case that the defendant was an undertaker; that the deceased selected the kind of a coffin she desired, and described the monument she wished erected, and specified the times at which the masses were to be solemnized; and the finding of the court is, that the defendant received the money on the terms stated by the deceased, and promised to apply it to the uses

and purposes therein mentioned. There was no indefiniteness about this contract, and it was easy of performance. There certainly can be no legal objection to a person contracting in his lifetime for his funeral, his coffin, and his monument, and even for the solemnization of masses, and paying for them in advance. And if so, what reason can there be for denying him the power of paying a sum of money to a third person on his agreement to procure those things? Suppose a person should desire in his lifetime to provide for the writing of his biography, the publication of his literary works, the painting of his portrait, or the erection of a statue of his memory after his death? He certainly can make a valid contract with any person to do either of those things, and pay for them; and although they may be personal to himself, and for the gratification of his own feelings and perhaps his vanity, and he cannot, in strictness, create a ²³⁰ trust for the purpose, because there will be no beneficiary, as he will not live to enforce it, why should he not be at liberty in his lifetime to contract with some person of his confidence to procure them to be done, and, as a consideration for such agreement, to pay him the sum necessary to defray the expense?" We may assume that if such an agreement has the sanction of the law, because it has the elements of a valid contract, so would a testamentary provision with precisely the same elements for its support. It is not wise, in such cases, for courts to quibble about technical trusts or beneficiaries. Results are of greater importance than technical names, and a bequest for a known lawful purpose, where the power of execution is prescribed and available, should never fail for want of a name or a legal classification, unless it is in obedience to a positive rule of law.

We have said that this bequest, if the priest should accept the money, is a private trust; and we think it possesses the essential elements of such a trust, as much as it would if the object were the erection of a monument or the doing of any other act intended alone to perpetuate the memory or name of the testator. But even if there is a technical departure, because of no living beneficiary, still the bequest is valid. We have also said that it is not a charity, and we can discover no element of a charity in it. It seems to be a matter entirely personal to the testator. In one or more cases the courts have felt the necessity, in order to sustain such a bequest, to denominate it a "charity," because charitable bequests have had the sanction of the law. We know of no such limitation on testamentary acts as that bequests or devises must be in the line of other such acts, if otherwise lawful. Such a bequest has direct support

in Seibert's Appeal (Pa.), 18 Week. Not. Cas. 276. In *In re Schouler*, 134 Mass. 426, such a bequest is sustained, and it is said: "Masses ²⁸¹ are religious ceremonies or observances of the church, . . . and come within the religious or pious uses which are upheld as public charities." Our conclusion is, that as to the devise of the farm and the bequest to the sisters of charity, the will must be held inoperative, and the property passes to the residuary estate. As to the bequest for the saying of masses for the testator, the will is sustained.

The judgment will stand modified and affirmed.

WILLS—PAROL EVIDENCE.—A cardinal rule in the construction of wills is, to give effect to the intention of the testator. The will must speak for itself, and from it the intention of the testator must be gathered: See monographic note to *Chappell v. Missionary Soc.*, 50 Am. St. Rep. 279, on extrinsic evidence to explain wills. Evidence as to the intention of a testator separate and apart from that conveyed by the language used in the will is not admissible for the purpose of interpreting the will: *Clarke v. Clarke*, 46 S. C. 230; 57 Am. St. Rep. 675.

LEGACIES.—BEQUESTS FOR SAYING MASSES are valid though they contain no element of a charitable use: See note to *McHugh v. McCole*, ante, p. 106; also monographic note to *Hoeffler v. Clogan*, 63 Am. St. Rep. 266, on what are charitable uses or trusts. See, also, monographic note to *Fifield v. Van Wyck*, 64 Am. St. Rep. 756-772, on the certainty and unity in charitable trusts.

FAUST v. CHICAGO AND NORTHWESTERN RAILWAY CO.

[104 IOWA, 241.]

CARRIERS OF LIVESTOCK—DESTRUCTION OF ANIMALS—RECOVERY.—If livestock are shipped under a contract which does not require the shipper to ride in the car carrying the stock but in the caboose, and such stock are destroyed by the burning of the car in which they are transported, the shipper may recover on proof that the fire was not due to any act or negligence on his part, unless there is proof that the loss was not caused by his failure to remain on the train, or by his failure to care for the stock while in transit.

CARRIERS OF LIVESTOCK—READING SHIPPING RECEIPT—INADMISSIBLE EVIDENCE.—In an action to recover the value of horses and other property lost by fire while being transported over the defendant's road, evidence that the plaintiff did not have time to read the shipping contract before signing it is not admissible under an averment of the petition that, after the property was loaded, the defendant's agent presented the contract to the plaintiff, and requested him to sign it; and that the plaintiff understood the paper to be a pass, to carry him to the place of delivery.

CARRIERS OF LIVESTOCK—SHIPPING RECEIPT—IMMATERIAL EVIDENCE—HARMLESS ERROR.—In an action to recover for property lost during the course of shipment, the admission of immaterial evidence that the plaintiff did not have time to read the shipping contract before signing it, is not prejudicial to the

defendant, if the court's instructions treat the contract as in force, and require the jury to so consider it.

CARRIERS OF LIVESTOCK—DESTRUCTION OF ANIMALS—NO RECOVERY, WHEN.—If the evidence, in an action to recover the value of horses and other property burned on the defendant's train, clearly shows that, at a certain station, where the train stopped, the plaintiff, who was the shipper and who, by the contract, was to accompany the stock, left the caboose to go to the stock-car but was not thereafter seen on the train, there is no right of recovery, although the plaintiff claims to have been left at such station, where his reputation for truth and veracity is bad, where some of his testimony is unreasonable and some of his statements untrue, where he seeks to recover for more horses than carcasses were found in the car, and where it appears that he, himself, was answerable for the fire which destroyed his property.

Action to recover the value of certain horses and other property burned and destroyed on one of the defendant's cars during the course of transportation. The plaintiff obtained a verdict and judgment, and the defendant appealed.

Hubbard, Dawley & Wheeler, for the appellant.

J. F. Martin, for the appellee.

²⁴² **ROBINSON, J.** On the twenty-fourth day of January, 1894, the plaintiff placed in a box-car of the defendant at Lisbon, Iowa, several horses, harness, a wagon, a buggy, and other articles, all of which were consigned to the plaintiff for delivery at Carroll. The car thus loaded was taken by the defendant, and hauled to a point a short distance west of Ames, where its contents were discovered to be on fire. Efforts were made to extinguish the fire, and to prevent damage to other cars of the train, and the burning car was hauled to Ontario, the first station west of Ames, and the fire was there extinguished, but not until the sides and roof of the car were burned, and its contents were destroyed. The plaintiff seeks to recover the value of the property which he placed in the car.

²⁴³ The defendant denies that the property destroyed was in its possession, denies that it was negligent in what it did concerning it, denies that it is in any manner responsible for the loss of the property, and avers that the fire which destroyed it was caused by the act of the plaintiff. In a counterclaim, the defendant asks judgment for the amount alleged to have been agreed upon for hauling the property from Lisbon to Carroll. In connection with the shipment of the property, the plaintiff signed a contract which contained the following provisions: "Shipment of livestock in carloads, or less than carloads, will only be taken at the rates named herein, after this contract or agreement shall have been signed by the company's station agent,

and the owner or shipper, by which it is agreed and understood that such owner or shipper shall load, feed, water, and take care of such stock at his own expense and risk. . . . All persons in charge of livestock will be passed on the train with and to take care of the stock, and will be expected to ride in the caboose attached to the train." The plaintiff claims that the train containing his car left Lisbon at 3 o'clock in the afternoon of January 24th, and that he rode in his car to Cedar Rapids, where he purchased a lantern; that he rode in the caboose from Cedar Rapids to Belle Plaine, where there was a change of conductors and cabooses; that there was considerable delay at Belle Plaine; that he went into restaurant for a few minutes, and when he came out could not find his car; that he then purchased a ticket for Nevada, and took the first westbound passenger train for that place in order to catch his car; that he reached Nevada a little before daylight, and failing to learn anything in regard to the train which contained his car, went to a hotel and waited until the next train for the west arrived; that he took that train and went on to Carroll, and there learned that his property had been destroyed as stated.

²⁴⁴ 1. The plaintiff testified that he did not read the shipping contract before he signed it, and was asked, "Why didn't you?" An objection by the defendant was overruled, and the plaintiff was permitted to answer: "Why, the freight was right there, and the agent says, 'Now, you want to get right on, or you will have to wait until night.' I was not quite ready for it yet. I left a coat down to the hotel, and a lantern I bought at Lisbon I did not get. I wanted to go after it, but could not do it, and a man said, 'You are a fool to have that agent run you out of town before you are ready.' I did not have time to read it before the freight started." A motion of the defendant to strike out the answer as immaterial and irrelevant was overruled, and the defendant complains of the ruling which permitted the jury to consider that evidence. We do not think it was material to any issue presented by the pleadings. In an amendment to his petition the plaintiff alleged that, after the property was loaded, the agent of the defendant presented to him the contract, and represented it to be a pass to carry him to Carroll, and requested him to sign it, and that he understood that it was a pass; that it seeks to change the liability of the defendant in regard to receiving, transporting, and delivering the property, and to excuse the defendant for negligence, and is void and of no effect; and that the only purpose for which it was given was to pass the plaintiff as a passenger in the ca-

boose of the train. There is no controversy over the fact that the contract included a pass, and the testimony in question did not tend to support any statement contained in the petition in regard to the contract, excepting that it was intended to pass the plaintiff as a passenger, and should not have ²⁴⁵ been admitted: See *Mulligan v. Illinois Cent. Ry. Co.*, 36 Iowa, 188; 14 Am. Rep. 514; *Wilde v. Merchants' etc. Transp. Co.*, 47 Iowa, 247; 29 Am. Rep. 479. But we think that the evidence could not have been prejudicial, for the reason that the charge to the jury treated the contract as in force, and required the jury to so consider it.

2. The defendant asked the court to instruct the jury that "the burden is upon the plaintiff to show, by a preponderance of the testimony, that his loss did not occur by reason of his acknowledged failure to remain upon the train with his stock and care for it. If he has failed to show you by such preponderance that the loss was not occasioned by such failure upon his part, then he cannot recover in this action." The defendant also asked the court to instruct the jury that the burden was on the plaintiff to show that his loss did not occur by reason of any failure on his part to carry out his agreement to take care of the horses while in transit, and that the mere fact that he remained at Belle Plaine when his car went west, whether left accidentally or by reason of his own negligence, would not excuse him from his contract to accompany the stock, or notify the proper officers of the defendant that he had been left, and could not care for the stock. The court refused to so instruct and charged the jury that, to entitle the plaintiff to recover, he must establish by a preponderance of the evidence that the fire which destroyed his property was not occasioned by any act of negligence on his part, and that, if he established that fact, he was entitled to recover for the property which he delivered to the defendant. It is said in 4 *Elliott on Railroads*, section 1549, that "where the owner accompanies the stock under a special contract to care for them himself, he may well be presumed to be as well acquainted with the facts in regard to their loss or injury as the carrier, and as they may have been injured because of his own negligence, or because of ²⁴⁶ their inherent nature and propensities, and not by the negligence of the carrier, it is but just to require him to show the facts. The rule in such cases, therefore, is that the burden of proof is upon the plaintiff to show that a breach of duty upon the part of the carrier caused the injury or loss, and, if the carrier is liable only for negligence, the burden is upon the plaintiff

to show such negligence": See, also, *Terre Haute etc. R. R. Co. v. Sherwood*, 132 Ind. 129; 32 Am. St. Rep. 239. But we do not think this case is within the rule of the authorities cited. Of course, the plaintiff should be held to the performance of his part of the agreement, but there was nothing in the circumstances or character of the loss shown to justify the conclusion that it resulted from the absence of the plaintiff. His contract did not require him to ride in his car, but in the caboose, and, had he been in the latter, he could not have prevented the fire if it was not caused by his agency. Therefore, if he showed, as the charge required him to do, that the fire was not occasioned by any act or negligence on his part, he was entitled to recover. We do not find that the court erred with respect to instructions refused or the charge given.

3. The appellant contends that the verdict and judgment are not sustained by the evidence. There is much in the record to sustain the claim thus made. The testimony of the plaintiff is in some respects unreasonable, and in conflict with facts which must be regarded as established. He states that the train which contained his car reached Belle Plaine about midnight; that he then went to his car and remained in it probably half an hour or longer; that there were three bales of hay in the middle of the car, only one of which had been opened; that he found everything in it in good order, and when he left extinguished the light in his lantern, placed it on the seat of the buggy, closed the car door, and probably fastened it, although he says he is not sure as to that, and then went ²⁴⁷ into a restaurant for warmth and something to eat; that he remained in the restaurant probably "twenty minutes, or so"; that there were several trains in the yard, and switching being done; that he went to the place where he had left his car, but could not find it; that he made inquiries, but could not learn anything of it; that he finally went to the ticket office, purchased a ticket for Nevada, and remained at the station, most of the time in the waitingroom, for three-quarters of an hour, or an hour, when a passenger train from the east arrived; that he entered one of the cars before daylight, and went to Nevada to catch his car; that when he arrived at that place he did not enter the depot, although he inquired for the train his car was in, but did not learn anything of it; that he went to a hotel, remained there an hour or two, without registering, procured something to eat in a candy store, and went to the depot about 9 o'clock; that he asked for a ticket for Carroll, but was given one for

Glidden; that he took the train for Carroll, but was obliged to pay twenty-two cents fare from Glidden. He introduced in evidence a railway ticket from Belle Plaine to Nevada, which he states he purchased in the former place, before leaving it on the morning of January 25th, but which he says the conductor failed to take up. The evidence on the part of the defendant shows the following: The freight train which contained the car of the plaintiff was known as "No. 31," and left Belle Plaine for the west at twenty-seven minutes after 12 o'clock midnight. It contained seventeen loaded and empty cars, and the car of the plaintiff was the second one from the caboose. During the night three cars were set out, one at Tama, one at Nevada, and one at Ames. A brakeman of the train states that a few minutes before the train left Belle Plaine the plaintiff came into the caboose, warmed himself, stated that he was with the car in question, and asked how soon the train would leave; that he was told that it ²⁴⁸ would leave soon, and he then prepared to go out; that in response to a question, he said he was going to his car; that he was told he had better remain in the caboose on account of the cold, but that he took his lantern and went out through the forward door, as though he were going to his car; and that he was not in the caboose again. The train stopped for coal and water at Lamoille, about twenty-two miles east of Nevada, and while there the conductor saw a light in the plaintiff's car. At Nevada a light was seen in the car by the conductor, a brakeman, and the fireman. The train arrived at Ames a few minutes after 5 o'clock, and remained there a little more than half an hour. It does not appear that any light was seen in the car at that place. Although the conductor passed the car while there, he did not notice anything unusual about it. Just after the train commenced to move from Ames, smoke was noticed by men in the caboose, and within a minute or two a fire was discovered in the car in question. The train was stopped, and the trainmen went to the car and looked for the plaintiff, thinking he might be in it. The south door of the car was found open far enough to permit a man to pass through the opening. Not finding the plaintiff in the car, one of the trainmen looked along the track for him, thinking he might have jumped from the car. An investigation of the car after the fire was extinguished showed that the fire had not originated below the car, as from a hot box, but inside. No bales of hay were found, although it is shown to be difficult to burn baled hay, and that

it burns slowly. Wire used for baling was found scattered about, but not together, as though around bales which had been burned. The bodies of but three horses were found, although four were billed, and recovery for four is sought. The first passenger train which went west from Belle Plaine after midnight, January 25th, was No. 5, which left at 3:23 o'clock A. M., and did not stop at Nevada, and reached Ames at 5:40 ²⁴⁹ o'clock A. M., leaving three minutes later, and seven minutes before No. 31 left. No ticket for Nevada was sold at Belle Plaine before No. 5 left. A man who rode in the waycar with the plaintiff, just before reaching Belle Plaine, waited at the depot until the next passenger train for the west left and went out on it, going in the car, which the plaintiff says he was in, but did not see him at the depot nor in the car. The ticket offered in evidence was so mutilated that all means of ascertaining from it the date on which it was issued were destroyed. There are other circumstances which tend to contradict the claim of the plaintiff that he did not leave Belle Plaine on No. 31. Four witnesses testified that they knew the reputation of the plaintiff for truth and veracity in the neighborhood where he had lived, and that it was bad, and they testified to the same effect in regard to his moral character. No attempt was made to rebut that evidence. After a very careful examination of the entire record in this case, we reach the conclusion that it is so clearly established by the evidence that the statements of the plaintiff with respect to his leaving Belle Plaine, and his arrival at Nevada, are untrue, and that he was responsible for the fire which destroyed his property, that the district court should have set aside the verdict. For its failure to do so the judgment rendered is reversed.

CARRIERS OF LIVESTOCK—INJURY—LIABILITY.—A shipper of livestock, where he undertakes to go with and care for the stock during transportation, cannot, in case of loss or injury, recover solely upon evidence of a failure to deliver; but he must also show that such failure was not due to his own negligence, but to a breach of duty on the part of the carrier; *Terre Haute etc. R. R. Co. v. Sherwood*, 132 Ind. 129; 32 Am. St. Rep. 239. If he contributes to the loss or injury by his own act or negligence, he cannot recover therefor against the carrier: *Note to Clarke v. Rochester etc. R. R. Co.*, 67 Am. Dec. 212, on the liability of carriers of live animals. See, also, monographic note to *Heller v. Chicago etc. Ry. Co.*, 63 Am. St. Rep. 548-566, on the respective duties of carriers and shippers of livestock.

HOYT v. BEACH.

[104 IOWA, 257.]

PLEADING—STRIKING OUT OF ANSWER—WHEN PROPER.—A motion to strike out an answer will be granted if its allegations are, in substance, the same as those of former answers, to which demurrers have been sustained, although it contains a statement that all former and amended answers are withdrawn.

EVIDENCE—JUDICIAL NOTICE AS TO PLEADINGS WITHDRAWN.—A court will take judicial notice that pleadings withdrawn were held insufficient on demurrer, as the matter is one of record.

INTEREST—ALLOWANCE OF, ON JUDGMENTS.—At common law, judgments carried no interest. Its allowance on judgments is controlled entirely by statute.

INTEREST—JUDGMENT FOR COSTS AND ATTORNEY'S FEES.—If the allowance of interest on a judgment is not limited by statute, a judgment for costs and attorney's fees will draw interest from the date of its entry.

Action upon promissory notes. There was a judgment for the plaintiff, and the defendant appealed.

F. M. Davenport, for the appellant.

J. P. Conner, for the appellee.

258 KINNE, C. J. 1. Without reciting all the facts of the case, it may be said that this appeal is from an order of the trial court sustaining a motion striking counts 2 and 3 of the defendant's answer. Some four grounds were stated in the motion as to each count. It does not appear from the record upon what ground the motion was sustained. The principal ground of the motion was that the answer was a repetition, in substance, of the former answer and amended and substituted answers filed by the defendant, to which demurrers had been sustained. The appellant claims that the last answer is not, in fact, a repetition of the former answer, and that if it was, as by a preliminary statement in the last answer to which the motion was directed, all former answers and amendments were withdrawn, the last answer could not be stricken as being a repetition of matters contained in former answers, as such answers 259 could no longer be considered. An examination of the record shows that the last answer differs in no material respect from those to which demurrers were sustained. Some new matter is found in this last answer, but it is simply a conclusion drawn from the same facts pleaded in both answers. Under the established rule of pleading, it is proper to strike an answer which is, in substance, a mere repetition of allegations which have been

held insufficient on a demurrer to a former answer in the same case: *Epley v. Ely*, 68 Iowa, 70; *Mayer v. Woodbury*, 14 Iowa, 57; *Robinson v. Erickson*, 25 Iowa, 85; *Phoenix Ins. Co. v. Findley*, 59 Iowa, 591. Whether the operation of the rule would be affected by the statement in the last answer that all former answers and amended answers are withdrawn has not been determined by this court. Now, an answer may be withdrawn; but the fact that it has been once filed, and that the facts set forth therein have been held insufficient on a demurrer, remains a matter of record, and is within the judicial notice of the court, acting upon the motion to strike the pleading; and the operation of the rule mentioned cannot be affected by the withdrawal of the former pleading, which is made in the latter pleading. Any other rule would permit parties to continue indefinitely to file pleadings which were mere repetitions of former pleadings, which had been held bad on demurrer. Such a construction would tend to disorder and a disrespect for the rulings of the court, would delay judicial procedure, and interfere with the orderly administration of justice. The matter contained in the answer last filed being the same, in substance, as the allegations contained in former answers, to which demurrers had been sustained, the court properly sustained the motion to strike.

2. In entering the judgment, the court provided that the judgment for costs and attorney's fees should draw interest at six per cent per annum from the date ²⁶⁰ of entry of the judgment. Appellant contends that this was erroneous. No authorities are cited to show that interest should not be allowed on attorney's fees and costs. The allowance of interest on judgments is controlled entirely by statute. At common law, judgments carried no interest: 2 Black on Judgments, secs. 880, 981. Our statute provides that interest shall be allowed on all money due on judgments and decrees of courts at the rate of six cents on the one hundred by the year, unless a different rate is fixed by the contract: Code 1873, sec. 2078. But few adjudicated cases are to be found which determine the right to interest on costs, and these are by no means in harmony. In Indiana, it is held that a judgment for costs bears interest, but that there is no statute authorizing the allowance of interest on "fees," and that a witness or officer takes his fees as taxed without interest: *Parker v. State*, 135 Ind. 534. See *Galbraith v. Walker*, 95 Pa. St. 481. In some of the states interest on costs, which seem also to embrace fees, is allowed: *Hayden v. Hefferan*, 99 Mich.

262; Linck v. Litchfield, 31 Ill. App. 104; Palmer v. Glover, 73 Ind. 532; Bates v. Wilson, 18 Colo. 287; Emmitt v. Brophy, 42 Ohio St. 82. Money due on a judgment for costs is as much money due on a judgment as is money due on a judgment for damages, and this is true whether such costs embrace the fees of witnesses or officers or attorney's fees. While we think it has been the understanding that costs did not draw interest, still we discover nothing in our statute allowing interest on judgments which limits its allowance to the judgment for damages only. There was therefore no error in providing that the costs and attorney's fees should draw interest.

Affirmed.

EVIDENCE—JUDICIAL NOTICE—PLEADINGS.—A court may take judicial notice of all previous proceedings and pleadings in a cause before it: Searls v. Knapp, 5 S. Dak. 325; 49 Am. St. Rep. 873, and note.

INTEREST ON JUDGMENTS.—At common law, judgments carried no interest; but this has been altered in most, if not all, of the states: Note to Bensimer v. Fell, 29 Am. St. Rep. 791. In Texas, interest is allowed upon all judgments: Finley v. Carothers, 9 Tex. 517; 60 Am. Dec. 179.

STATE v. REPP.

[104 IOWA, 305.]

ANIMALS—BEES—RIGHT OF PROPERTY IN.—The mere finding of bees, in a bee tree, on another's land, gives^a the finder no right to them or to the tree.

LARCENY—SWARM OF BEES—TRESPASSER.—A trespasser who finds a bee tree on another's land, and, without the latter's permission, chops it down and hives the bees in a gum not owned by himself, has no interest in them which is the subject of larceny.

Conviction for the larceny of a swarm of bees. A fine of five dollars was imposed upon the defendant and he appealed.

T. B. Perry, for the appellant.

Milton Remley, attorney general, and Jesse A. Miller, for the State.

³⁰⁵ LADD, J. In July, 1895, Stevens found a bee tree on the land of Cody, and, without the latter's permission, chopped it down, and put the bees in a gum obtained from Mosely. These were left near the fallen tree on Cody's land. The gum was cut from a tree on defendant's land, without his knowledge or consent; and finding it, with the bees, where left by Stevens, he removed them, at dusk of day, to the orchard of his

mother, and inclosed them in a telescope gum, about thirty-three inches square, nailed to that procured from Mosely. This was unknown to the mother, whose residence was about one mile from the bee tree, while that of the defendant was three miles further away. It does not appear that the defendant knew who hived the bees, or ³⁰⁶ that Stevens was aware that Mosely was not owner of the gum. When Stevens discovered the bees, after several days' search, the defendant refused to do more than return them, and after some parley this prosecution was begun.

Wild game is under the control of the state, and only becomes the subject of private ownership when reclaimed by the art and industry of man. A somewhat different rule applies to bees, though *ferae naturae*. These have a local habitation. Blackstone states: "It hath also been said that with us the only ownership in bees is *ratione soli*; and the charter of the forest, which allows every freeman to be entitled to the honey found within his own woods, affords great countenance to this doctrine that a qualified property may be had in bees, in consideration of the property of the soil whereon they are found." The same rule is laid down in *Cooley on Torts*, 435, where it is said that bees "have a local habitation, more often in a tree than elsewhere, and while there may be said to be within control, because the tree may at any time be felled. But the right to cut it is in the owner of the soil, and, therefore, such property as the wild bees are susceptible of is in him, also." And it has been so adjudged in *Ferguson v. Miller*, 1 Cow. 243, 13 Am. Dec. 519, and *Rexroth v. Coon*, 15 R. I. 35; 2 Am. St. Rep. 863. By the law of nature, the person who hived the swarm would be entitled to it; but, under the regulation of property rights, since the institution of civil society, the forest, as well as the cultivated field, belongs to the owner thereof, and he who invades it is a trespasser: *Goff v. Kilts*, 15 Wend. 550. See *Adams v. Burton*, 43 Vt. 36. The mere finding of bees on the land of Cody gave Stevens no right to them, or to the tree: *Merrils v. Goodwin*, 1 Root, 209; *Gillet v. Mason*, 7 Johns. 16. In cutting down the tree and taking the bees, he was a wrongdoer. Had he acted with the license of Cody, he might have acquired ownership, but ³⁰⁷ he could obtain no title by his wrongful acts as a mere trespasser: *Rexroth v. Coon*, 15 R. I. 35, 2 Am. St. Rep. 863. In that case the plaintiff had placed a box in the crotch of the tree belonging to Green, without permission, and later the defendant, without the consent of either, took the box from the tree, emptied it of bees and honey, and then replaced it. In

holding that the plaintiff was not entitled to recover, the court said: "The plaintiff was a trespasser upon the land of Green. He had no right to place the box or hive in the tree, and by placing it there he acquired no title to the bees which subsequently occupied it, or to the honey which they produced." No better title would be acquired by removing the bees from the tree top to a box on the land, than by luring them to a box placed in a tree top. Title to a thing *ferae naturae* cannot be created by the act of one who at the moment is a trespasser, and Stevens obtained no interest in the bees by the mere wrongful transfer from the tree to the gum. He neither owned the land on which he left them, nor the gum in which they were hived. Having neither title nor possession, he had no interest therein, the subject of larceny. As the information alleged ownership in Stevens, and the case was tried on that theory, we need make no inquiry as to any taking from Cody. But see *Wallis v. Mease*, 3 Binn. 546.

Reversed.

OWNERSHIP IN BEES—LARCENY.—Bees are *ferae naturae*, and the only ownership in them, until reclaimed and hived, is *ratione soli*: *Rexroth v. Coon*, 15 R. I. 35; 2 Am. St. Rep. 863. Until reclaimed and hived, no property can be acquired in them. Wild bees in a tree belong to the owner of the soil where the tree stands; but his ownership is not of such a nature as would make it larceny to steal them: Note to *Wheatley v. Harris*, 70 Am. Dec. 260, on property in inferior animals. Animals *ferae naturae* are not a subject of larceny, but bees in the possession of the owner are a subject of larceny: See extended note to *State v. Homes*, 57 Am. Dec. 277, on what articles are a subject of larceny. The act of reducing a thing *ferae naturae* into possession creates no title thereto if such act is wrongful: *Rexroth v. Coon*, 15 R. I. 35; 2 Am. St. Rep. 863.

DAY v. GOODWIN AND STEVENS v. GOODWIN.

[104 IOWA, 374.]

JUDGMENT—FORECLOSURE—SERVICE OF PROCESS—PERSONAL JUDGMENT AGAINST ONLY ONE DEFENDANT—VALIDITY OF DECREE AS TO ALL.—If a decree in a mortgage foreclosure suit, where the plaintiff asks a judgment of foreclosure against all of the defendants, is entitled as against all of them, recites due and legal service, adjudges them all to be in court, but in default, finds that a foreclosure is proper, and orders the land to be sold, it must, though personal judgment is given against only one, and his right of redemption alone is cut off, be held good to some extent, at least, as against all of the defendants, in a proceeding which expressly ignores or denies its existence, but which is not a direct attack upon it.

JUDGMENT—PROCEEDING TO ANNUL—PARTIES.—In a proceeding, either at law or in equity, to annul a judgment, all of the parties to the judgment should be made parties.

JUDGMENT—DEFECTIVE SERVICE OF PROCESS—WHEN EXTRINSIC FACTS TO DEFEAT ARE AVAILABLE ONLY ON DIRECT ATTACK.—Although the service of notice of the pendency of an action is irregular and insufficient, yet, if the court assumes jurisdiction, the judgment is not void, where the service appears, upon the face of the record, to be good. Hence, extrinsic facts relied upon to defeat it can be shown only in a direct attack on the judgment.

JUDGMENT—DEFECTIVE SERVICE OF PROCESS ON PARTY ADJUDGED INSANE—EFFECT OF.—If a wife has been adjudged insane, but is living with her husband when both are made parties defendant to a foreclosure action, and notice of the pendency of the action is served upon both, the judgment therein is not void, though a strict compliance with the statute, in such a case, would have required the notice to her to be also served upon her husband.

APPEAL—AFFIRMATIVE RELIEF—WHEN DEFENDANT CANNOT CLAIM ON PLAINTIFF'S APPEAL.—Upon an appeal by the plaintiff from a denial of his request for a nunc pro tunc order requiring the clerk to record a former decree, the defendant can claim no affirmative relief by reason of a motion made by himself for leave to answer, where no ruling was made upon such motion, and he took no appeal.

JUDGMENT—WHEN NUNC PRO TUNC ORDERS SHOULD BE GRANTED.—The action of a court cannot be falsified by the failure of a mere ministerial officer to perform his duty, and the plaintiff has a right to have the record show what the court did in his case. Hence, if a decree has been prepared and signed by the judge, and given to the clerk, who files, but fails to record it, the plaintiff is afterward, if no rights of third parties have intervened or will be affected thereby, entitled to a nunc pro tunc order requiring the clerk to record the decree, irrespective of the question whether the proceedings in the case were regular or irregular, valid or invalid.

The cases discussed in the opinion were submitted and considered together, as the matters involved were so intimately related that they presented, in effect, but one cause. There was a decree and judgment for the defendants, and the plaintiff Day, who was substituted as plaintiff in one of the actions, appealed.

M. W. Frick and H. S. Winslow, for the appellant.

Botsford, Healey & Healey, for the appellees.

376 WATERMAN, J. On October 3, 1885, the defendants Ann Goodwin and Richard, her husband, being indebted to one H. M. Stevens, executed to him their promissory note for the amount, and also a mortgage securing it, on the real estate in controversy, situated in Calhoun county, Iowa. An action was brought in the name of Stevens, as plaintiff, and against the Goodwins and one Horton and one Dautremont, as defendants,

to foreclose this mortgage, at the February term of the Calhoun district court. The proceedings thereafter in said foreclosure, in the order in which they occurred, are as follows: Complete record entry: "And now, towit, on this twentieth day of February, A. D. 1889, the same being the second day of the regular February, 1889, term of said court, Richard Goodwin, defendant, files answer. Default. Personal service, and Goodwin, A. A. Horton, L. A. Dautremont. Now, towit, on this twenty-first day of February, A. D. 1889, the same being the third day of the regular February, 1889, term of said court, reply to answer of Richard Goodwin. Defendant Richard Goodwin files motion to take evidence in form of depositions. Motion sustained, and the evidence of defendant is ordered to be in the form of depositions, and the plaintiff, at his election, may take his either in form of depositions or any way on the time of trial. Judgment for amount of one note and attorney's fees against Ann Goodwin, defendant. To all defendant excepts, Richard Goodwin." This entry seems to be but a copy of the entry in the judge's docket. On February 20, 1889, a decree was signed by the judge, reciting due service of original notice upon Ann Goodwin, Horton, and Dautremont, giving judgment against ³⁷⁷ Ann Goodwin for twelve hundred and ninety-one dollars and nine cents, with interest at eight per cent, and costs of suit taxed at sixty-nine dollars and twenty-six cents, and decreeing a foreclosure of the mortgage and sale of the land, and ordering special execution therefor. This decree was filed, with the papers in the cause, February 20, 1889, but was never recorded. On October 10th of the same year, the matter coming on for hearing against Richard Goodwin, a supplemental decree was entered and recorded in which a judgment was rendered against him for fifteen hundred and sixty-one dollars and twenty-seven cents, with interest at eight per cent, and costs of suit, including attorney's fees, taxed at ninety-two dollars and ninety-five cents, and foreclosing the mortgage, and ordering special execution to issue. This cause was known as "Equity No. 579," and will be so referred to here. Thereafter, on November 16, 1889, the land was sold under special execution issued on both said decrees for the sum of sixteen hundred and ninety-seven dollars and thirteen cents; and plaintiff Day, as assignee of the certificate of sale, received on November 19, 1890, a sheriff's deed. Plaintiff has owned and occupied the premises since that time, and has made valuable improvements thereon. It appears, too, that plaintiff took the assignment of the certificate of sale at the re-

quest of Richard Goodwin, and that, upon the latter's representation that no redemption would be made, plaintiff paid him the sum of four hundred dollars. These facts are shown by plaintiff in the case of Day against Goodwin, and it is asked that his title be quieted. The defendant appears by Richard Goodwin, as her guardian, and admits the execution of the mortgage and note. But it is alleged that said Ann Goodwin was of unsound mind at the time of the service of the original notice in No. 579, and has been so judicially declared. This notice, it ³⁷⁸ may be here said, was served by reading and giving a copy thereof to Ann Goodwin, as provided in section 2603 of the Code of 1873. A cross-bill is also filed in which is set up the insanity of defendant, the ownership of the land, and a denial of the fact that any judgment was rendered in the foreclosure proceedings. It is also claimed that Day is liable for the rental value of said premises in the amount of eighteen hundred dollars; and the prayer is, that she have judgment against him, and that her title be quieted. The lower court allowed the plaintiff the amount due on his mortgage, charged him for rents, and gave judgment for the remainder, fifteen hundred and forty-two dollars and forty-three cents, to plaintiff, and established it as a lien on the land. It set aside the sheriff's deed to plaintiff, and decreed title to the premises to be in defendant, and the real estate was then ordered sold to pay plaintiff's lien. On motion, it was ordered that all costs, including filing fee and service of original notice, except costs of witnesses who testified to improvements, be taxed to plaintiff. From this decree and order plaintiff appeals. To avoid confusion, we will consider these issues first, and state the facts in the case of Stevens against Goodwin later on.

Plaintiff, claiming title through the proceedings in the Stevens foreclosure, seeks to quiet the same as against Ann Goodwin, who was a defendant therein. It is claimed in her behalf that the sale and deed in that case were void, for that no judgment was ever rendered in said cause. This must be the ground upon which the defendant can succeed, if at all, for the claim that the original notice was not properly served, and which will be spoken of more fully later, cannot be considered except upon application to set aside the judgment if one was rendered; and neither the answer nor cross-bill suggests that any such relief is desired. The theory of the defense is, that equity ³⁷⁹ cause No. 579 is still open and pending, and that Ann Goodwin has a right to make defense therein. We may assume that the entry apparently copied from the judge's docket is, so

far as it pretends to be a judgment, absolutely void, and that the decree signed by Judge Connor, but never recorded, has in such condition no force or effect; but there is still another entry to be disposed of, and this is the supplemental decree of October 10, 1889, which was duly recorded and approved. This language is found in this entry: "And the court finds, after an inspection of the record, that due and legal service of notice of the pendency of this cause has been made upon said defendants, and that said defendants having failed to appear, and though solemnly called, came not, but made default, it is therefore ordered by the court that said defendants be adjudged in default." The court further finds that "plaintiff is entitled to a foreclosure of said mortgage as prayed in the petition." A judgment is then given against Richard Goodwin, the land ordered sold, and his equity of redemption decreed to be barred. This entry is entitled against Ann Goodwin, Richard Goodwin, Dautremont, and Horton. The parties were all adjudged to be in court. The plaintiff was asking as against all defendants a judgment of foreclosure. Reading the decree in the light of the record, and it in terms appears that all defendants were held to be in default, and the land ordered sold, though personal judgment is given only against Richard Goodwin, and his right of redemption alone is cut off. It is, as against Ann Goodwin, certainly informal. It might not withstand a direct attack. It may be that it was not intended to mean all that it says, but we think it must be held good, to some extent at least, as against all defendants in a proceeding that expressly ignores or denies its existence.

390 There are two methods, either of which defendant could have adopted to secure relief as against this judgment if it is voidable for any of the reasons she sets up. She could have instituted proceedings at law under sections 3154, 3157, and 3158 of the Code of 1873, by asking to have the judgment vacated, or she might have proceeded in equity: See *Jackson v. Gould*, 96 Iowa, 488; *Larson v. Williams*, 100 Iowa, 114, 62 Am. St. Rep. 544, and cases cited. But in either such event the parties to the judgment should be made parties to the proceeding to annul it. In the case at bar, the proper parties were not in court to authorize relief against the judgment, even if such relief was asked. But it is claimed by defendant, in effect, that there was no notice of the pendency of the foreclosure proceedings served upon her, and that because of this fact, the judgment therein is absolutely void as to her, and may be ignored. The notice was in fact

served by reading and giving to her a true copy, as provided by section 2603 of the code of 1873, as already said; and, although Mrs. Goodwin had been previously adjudged insane, she was not, when the foreclosure suit was begun, confined in an asylum, but was living with her husband; nor had she a guardian at this time. The notice was served upon both Ann and Richard Goodwin, who were parties defendant. The statute (Code 1873, sec. 2615) requires that in such cases the service on the insane person "may be made upon him and upon his guardian, and if he have no guardian then upon his wife or the person having the care of him or with whom he lives," et cetera. A strict compliance with this provision would have required the notice to Ann Goodwin to be served, not only on her, but also on her husband, although, as a matter of fact, he was present at the time, and was served with a similar notice as a joint defendant. Though the notice be irregular and insufficient, yet, if the court takes jurisdiction, the judgment is not void: ³⁸¹ De Tar v. Boone County, 34 Iowa, 488; Woodbury v. Maguire, 42 Iowa, 339; Moomey v. Mass, 22 Iowa, 380; 92 Am. Dec. 395. There are many other cases to like effect, but we need not cite them. The service appears upon the face of the record to be good. The defendant relies upon extrinsic facts to defeat it. We think it manifest on principle that in such case the showing can be made only in a direct attack on the judgment. It may be said in defendant's behalf that the action on her part below, in the case of Stevens v. Goodwin, being "Equity No. 579," was in the nature of direct attack. This naturally leads to a consideration of what was done in that case.

After the action of Day v. Goodwin was brought, and after the discovery that the entry signed by Judge Connor had not been recorded, defendant, on October 7, 1895, filed an answer of general denial in "No. 579," Day moved to strike this answer from the files. There was no ruling on this motion. On October 8, 1895, Day made a motion to be substituted as plaintiff in No. 579, and for an order nunc pro tunc requiring the clerk to record the Connor decree. October 12, 1895, defendant Ann Goodwin, through her guardian, filed a motion for leave to answer in said cause, and attached to the motion an answer containing substantially the same facts we have been considering in Day v. Goodwin. No ruling was made on this motion. Thereafter, on October 13, 1896, the trial court entered an order allowing Day to be substituted as plaintiff, but holding that he "had no right to have a nunc pro tunc order made directing the clerk to record in the

records of the court the certain alleged judgment and decree as of the twentieth of February, 1889." From this order the appeal we are considering was taken by Day. No complaint of the lower court's action or nonaction is made by Goodwin. Conceding that Ann Goodwin's proceedings in this matter were in the nature of a direct ³⁸² attack, yet her right has not been passed upon by the lower court. Not having appealed, she can claim no affirmative relief here at this time. Her motion for leave to answer still stands undisposed of in the lower court. We have, then, to consider only whether plaintiff was entitled to the nunc pro tunc order asked.

It is not claimed that any rights of third parties have intervened or will be affected by such order. The action of the lower court in substituting Day as plaintiff in that cause is not questioned. The right claimed to a nunc pro tunc order is only a right to have the records show what the court in fact did in the case. The decree was prepared and signed by the judge, and given to the clerk, who filed, but failed to record it. In passing upon the right to this order, it is immaterial whether the proceedings in the case were regular or irregular, valid or invalid. The sole matter to consider is, shall the failure of a mere ministerial officer to perform his duty have the clerk to falsify the action of the court? We think the authorities sustain the right of Day to have the order prayed for: *Fuller v. Stebbins*, 49 Iowa, 376; *Tracy v. Beeson*, 47 Iowa, 155; *Buckwalter v. Craig*, 24 Iowa, 215; *Shelley v. Smith*, 50 Iowa, 543. It is true that the order made by the court in Equity No. 579 was not entered until after the decree was rendered in Day against Goodwin, but this should not prejudice plaintiff, for his application for the relief was on file long before the disposition of the case last-mentioned.

What we have said makes our conclusions apparent. Plaintiff should have had a decree on his bill to quiet title, the costs should have been taxed to defendant, and plaintiff was entitled to the order prayed for in No. 579. The action of the lower court in both cases will be reversed.

JUDGMENT, VALIDITY OF—DEFECTIVE SERVICE OF PROCESS.—If the statute, in the case of infants and lunatics, requires process to be served upon certain persons, and service is made upon some of them, but not upon all, such service is unquestionably defective, but whether it is void is an unsettled question. In some states it is treated as a mere defect in the service of process, not sufficient to deprive the court of jurisdiction to proceed with the cause: See monographic note to *Sanford v. Edwards*, 61 Am.

St. Rep. 492, on how jurisdiction is affected by defects in the service of process. Mere defects in the service of process do not render a judgment void: See extended note to Furman v. Furman, 60 Am. St. Rep. 645.

JUDGMENT NUNC PRO TUNC, WHEN PROPER.—A court has power to enter a judgment nunc pro tunc. The office of such an entry is to record some act of the court done at a former term, which was not then carried into the record: Cleveland etc. Printing Co. v. Green, 52 Ohio St. 487; 49 Am. St. Rep. 725. Such an entry is proper where the clerk has failed to record a formal judgment which has been pronounced by the court: See monographic note to Ninde v. Clark, 4 Am. St. Rep. 830, on the nunc pro tunc entry of judgments.

PRATT v. PROUTY.

[104 IOWA, 419.]

CONTRACTS — UNDERSTANDING OF PARTIES — EVIDENCE.—If the terms of an instrument are not ambiguous, the testimony of the parties as to how they understood it, is inadmissible.

CONTRACTS — UNDERSTANDING OF PARTIES — EVIDENCE.—The best evidence of how the parties to an agreement understood its terms is afforded by their acts under it, and these may be shown to aid the court in arriving at a proper interpretation.

CONTRACTS — UNILATERAL AGREEMENT TO SELL STOCK — CONSTRUCTION OF OPTION.—If one of the stockholders in a corporation agrees to sell to other stockholders therein enough stock to reduce the former's holding to one-third of the whole capital stock, in amounts of ten thousand dollars, at the end of each business year, after a dividend has been declared and paid on the stock, the agreement is unilateral and will be construed to mean that the sum stated is merely the one fixed as the greatest amount of stock that can be demanded in any one year, particularly where such construction seems to accord with the understanding of the parties.

CONTRACTS — EXERCISE OF OPTION TO PURCHASE STOCK — CONSENT OF PARTIES JOINTLY INTERESTED.—If one of the stockholders in a corporation agrees to sell to other stockholders therein a specified amount of stock, in the number of shares to each that they may agree upon, the consent of all the persons having an interest in such option is necessary to its exercise by any one of them, and this requires the consent of an interested party who has sold his stock in the corporation, for he is still a party to the agreement.

Action for damages for a failure to sell and deliver certain shares of stock. There was a verdict and judgment for the defendant and the plaintiff appealed.

Earle & Prouty, for the appellant.

Cummins, Hewitt & Wright, for the appellee.

⁴²⁰ **WATERMAN, J.** As to many of the facts presented by appellant, there is no dispute. We may state the case in this

way: In November, 1888, plaintiff and defendant, together with Isaac W. Aikin and P. H. Skinner, incorporated as the Prouty & Pratt Company, for the purpose of carrying on a wholesale grocery business in Des Moines, Iowa. The capital stock of the corporation was one hundred and sixty-two thousand dollars, divided into three hundred and twenty-four shares, of five hundred dollars each, which were held by the different parties in the following amounts: Defendant, one hundred and sixty-four shares; plaintiff, one hundred and eight shares; Isaac W. Aikin, fifty shares; P. H. Skinner, two shares. At or about the time of the incorporation of said company, an agreement was entered into by defendant, a copy of which is as follows: "Des Moines, Iowa, Nov. 24, 1888. In consideration of one dollar in hand paid, I hereby agree to sell to W. J. Pratt, Isaac W. Aiken, and P. H. Skinner, my associate partners in the Prouty & Pratt Co., enough of the capital stock that I may hold in said Co. to reduce my capital stock to one-third of the whole capital stock in said Co.: provided, stock is to be purchased by said W. J. Pratt, Isaac W. Aiken, and P. H. Skinner at par, in amounts of ten thousand dollars, at the end of each business year of said Co., after a dividend has been declared and paid on said stock; and I further agree to sell and deliver to the above parties the ten thousand dollars' stock in the number of shares to each that they may agree upon. C. C. Prouty."

It is claimed by the appellant that the trial court erroneously construed this contract as providing that ⁴²¹ plaintiff and his associates, Aikin and Skinner, could call each year for exactly the amount of ten thousand dollars of said stock —no more and no less. We are by no means sure that the record shows the lower court to have so construed the contract. We are called upon, however, to give our interpretation of it. It must be admitted that the ten thousand dollars mentioned in the contract was a limitation of some kind. Was it meant to limit the purchaser's rights to exactly ten thousand dollars' worth of said stock, or did it mean that no less, or that no more, than ten thousand dollars in amount was to be taken in any one year? Appellant says it could not have been a restriction to the exact amount stated, because defendant held twenty-eight thousand dollars more than one-third of the stock, and to say that the purchaser could demand only the particular sum of ten thousand dollars, would be to deprive him or his associates of the ability to get the whole of the surplus offered them in this agreement; for, after two calls, there would remain a sum of but eight thou-

sand dollars in defendant's hands. He insists that the agreement meant that no less than ten thousand dollars should be demanded at any one time. But we think this leaves him in the same dilemma he has stated as arising from the construction which he says was given by the lower court. Plaintiff claims to have demanded ten thousand the first year, and a like sum the second year. This would leave, under his construction, a remainder of eight thousand dollars, which could never be obtained. We suggest that the ten thousand dollars mentioned was an amount that could not be exceeded; that it was fixed as the largest sum that could be demanded in any one year. Let us look at the contract in the light of this suggestion. One of the first provisions governing ⁴²² the construction of a written instrument is that it should be interpreted, if possible, so as to effectuate the intention of the parties. When it is ascertained what the parties intended, the contract will be construed so as to carry out that intent, as far as the language employed will admit. To discover the intent, we can consider, not only the written instrument and its subject-matter, but the situation of the parties, and the circumstances surrounding them, at the time the contract was made: *Field v. Schricher*, 14 Iowa, 119; *Jacobs v. Jacobs*, 42 Iowa, 600. This was a unilateral agreement. The defendant was bound to sell. The plaintiff was under no obligation to buy. The price fixed for the stock was its face, or par, value. Plaintiff, of course, would not exercise his option to purchase unless the stock should be worth more than this. The greater the value of the stock, the more of it the plaintiff would naturally want; and, for like reason, the less of it defendant would care to dispose of. Viewing the matter in this light, it is but reasonable to think that defendant would fix a limit to the amount that he was willing to part with in any one year. This construction, we think the evidence shows, is in accord with the understanding of the parties. The best evidence of how the parties to an agreement understand its terms is afforded by their acts under it, and these may be shown in order to aid the court in arriving a proper interpretation: *Thompson v. Locke*, 65 Iowa, 429. Plaintiff claims that this stock, when he made his first demand, had earned for that year eleven and one-half per cent, net, making it worth a considerable sum above the price he was to pay, and at the end of the second year it had earned net twenty-three per cent; yet he demanded each time just ten thousand dollars in amount. It is difficult to believe that plaintiff did not try to get all that he considered he was entitled to of the stock

that was yielding such handsome returns. ⁴²³ As we have already said, we do not find in the record that the lower court gave the contract the construction alleged by plaintiff. There is nothing in the instructions to indicate that it interpreted the agreement differently from what we do. The instrument does not appear ambiguous in its terms. The rulings of the trial judge excluding the statements of the parties as to how they understood the words they had used, were correct.

We have devoted this much attention to the construction of this agreement because we think, notwithstanding the special verdict which was rendered by the jury, that the plaintiff might have been prejudiced by an erroneous interpretation of the option given by defendant; but we are quite clear that every other question in the case is disposed of by the findings of the jury. In response to special interrogatories submitted, the jury found that plaintiff made no demand for stock at the end of the first year, and that he did not have the consent of Aikin and Skinner to take the stock at the end of the second year. While Aiken had disposed of his stock during the second year, he was still a party to this agreement, and his consent was necessary to give validity to plaintiff's demand. There was testimony to sustain these findings and we have no disposition to interfere with them. For the reasons given, the judgment below will be affirmed.

CONTRACTS—CONSTRUCTION—EVIDENCE.—If the words of a contract are clear in themselves, it must be construed accordingly: *Cravens v. Eagle Cotton Mills Co.*, 120 Ind. 6; 16 Am. St. Rep. 298; and the parties cannot testify to their understanding and intention to aid in the construction: *Davis v. Robert*, 89 Ala. 402; 18 Am. St. Rep. 126. If the terms of a parol agreement are in doubt, the acts of the parties in the execution of it are the best guides for its interpretation: *Note to Wyatt v. Larimer etc. Irrigation Co.*, 18 Colo. 298; 36 Am. St. Rep. 291.

UNILATERAL CONTRACTS ARE ENFORCEABLE: *Cooper v. Lansing Wheel Co.*, 94 Mich. 272; 34 Am. St. Rep. 841; *Ross v. Parks*, 96 Ala. 153; 30 Am. St. Rep. 47.

WILLIAMS v. HAMILTON.

[104 IOWA, 423.]

EQUITY—MISTAKE—REFORMATION OF CONTRACT—WHEN NOT JUSTIFIED.—A mistake as to the construction or legal effect of a written agreement between two parties does not justify its reformation unless the mistake is mutual. A mistake by one of the parties, unaccompanied by any fraud of the other is not enough.

EQUITY—MISTAKE AND FRAUD—REFORMATION OF CONTRACT—WHEN JUSTIFIED.—A mistake of law by one of

two parties to a written agreement, if accompanied by fraud of the other party, may, under certain circumstances, authorize a reformation of the contract.

EQUITY—MISTAKE AND FRAUD—REFORMATION OF CONTRACT—WHEN JUSTIFIED.—If one of two parties to a contract is illiterate and relies upon the other, to the latter's knowledge, to embody their oral agreement in a written contract, the former may have the contract reformed so as to conform to their understanding, where it was read over to him before it was executed, and he called attention to a certain omission, but was assured by the other party that the contract covered everything agreed upon, which was not true.

NEGLIGENCE—ILLITERACY—CONTENTS OR LEGAL EFFECT OF WRITING.—An illiterate party is not negligent in signing a contract without informing himself as to its contents or legal effect, where he relies upon the other party to properly express the terms of their oral agreement in a writing, and upon the latter's representation that he has done so.

EQUITY—REFORMATION OF CONTRACT—RATIFICATION.—A party to a written agreement cannot ratify it, after its execution, without knowing and understanding its contents. Hence, he is not precluded from obtaining a reformation thereof, on the ground that he ratifies it after its execution, where there is no showing of any such knowledge.

VENDOR AND PURCHASER—WHO IS NOT A BONA FIDE PURCHASER—INADEQUATE CONSIDERATION.—If a wife is conversant with the terms of an oral agreement, whereby her husband attempts to obtain land for an inadequate consideration, a conveyance of the land to her will be deemed an act in furtherance of such attempt, and she cannot, therefore, be regarded as an innocent purchaser for value.

Suit in equity to rescind and set aside a contract for the exchange of real property because of fraud; or to reform the contract because of mistake, and to recover the balance of the consideration due thereon as reformed. A reformation was decreed and damages awarded. The defendants appealed.

Bishop, Bowen & Fleming, for the appellants.

B. O. Clark, Russell & Toliver, and M. W. Beach, for the appellee.

⁴²⁴ **DEEMER, C. J.** After some negotiations between plaintiff and defendant B. C. Hamilton with reference ⁴²⁵ to the exchange of real estate, they entered into a written contract, of which the following is a copy:

"To Whom It May Concern: This is to certify that we have this day entered an agreement whereby J. T. Williams will sell and convey unto Dr. B. C. Hamilton one hundred and seventy-six acres of land, described as follows, to wit: The northeast fraction of the northwest quarter of section 2, of Glidden township, Carroll county, Iowa, containing fifty-eight acres; also south half of northeast quarter; also, north half of north half of southeast quarter of section 2, in Glidden township, Carroll county, Iowa.

The said Dr. B. C. Hamilton agreeing to give me, in payment for same, one house and four lots, situated in S. & S. addition of Scranton, Iowa; also, sixteen head of shoats—the above valued at seventeen hundred dollars; also, two thousand five hundred dollars' worth of accounts and notes; the said J. T. Williams agreeing to return to the said B. C. Hamilton all money or accounts left after collecting the nineteen hundred dollars, the sum total being three thousand five hundred dollars; the said B. C. Hamilton guaranteeing the said amounts to be true and correct in all respects, and giving two years for collection, but not guaranteeing the payment of same.

“Dated at Scranton city, Iowa, 2, 21, 1891.

“Witnesses:

“CHARLES ROWLEY,
“NELLIE ROWLEY.”

“B. C. HAMILTON,

his

“J. T. X WILLIAMS,
mark.

Plaintiff claims that the contract was induced by fraud, in that defendant represented that the town lots were worth sixteen hundred dollars, and had cost him that amount, whereas, in truth and in fact, they were worth and had cost but nine hundred dollars; ⁴²³ and that the accounts and notes referred to in the contract were correct, and were against persons of good credit and financial standing, and would be paid within one year, whereas, in truth, the said accounts and notes were incorrect and untrue, and were against persons of poor credit and standing. Plaintiff further alleged that defendant agreed to assign the notes and accounts to him as security for the payment of eighteen hundred dollars, inducing him to believe that such security would be better than a mortgage upon the property, and that, when the contract was reduced to writing by defendant, he (defendant) pretended to embody this condition therein, and stated to plaintiff (who is illiterate, and unable to either read or write) that the contract as so written, contained all of the oral contracts previously made, whereas, in truth, it did not set forth the true agreement, but contained a clause absolving defendant from future liability on account of the notes and accounts; that defendant intentionally omitted from the written contract his oral promise to pay eighteen hundred dollars in cash within two years from the date of the contract, and his further promise to assign two thousand five hundred dollars' worth of accounts and notes as security for this payment; and taking advantage of plaintiff's ignorance, fraudulently and intentionally wrote the contract as it now appears; that plaintiff believed from defend-

ant's statements that the written contract contained the oral agreement theretofore made, and was thereby induced to sign the same. Plaintiff further charges that he conveyed the land called for by the contract to B. C. Hamilton, who in turn conveyed the same to Maggie Hamilton, but that this last-named conveyance was made with intent to wrong and cheat him out of the purchase price. He further alleges that he received a conveyance of the town lots, the personal property called for by the contract, and an assignment of notes ⁴²⁷ and accounts, but that said notes and accounts were not worth to exceed seven hundred and twenty dollars and fifty cents, which was the amount actually collected thereon. He further pleaded a rescission of the contract, and asked that defendants be ordered to reconvey, or that the written contract be reformed to express the true agreement of the parties, and that he have judgment for the remainder of the eighteen hundred dollars agreed to be paid. The trial court denied the prayer for rescission, but decreed a reformation of the contract, and awarded plaintiff the balance of the eighteen hundred dollars. As plaintiff is content with this conclusion, and does not appeal, we have only to consider the correctness of the decree reforming the contract. If the decree is right as to the reformation, then it should be affirmed, for there is no doubt that the award of compensation thereunder is correct.

It appears from the evidence that plaintiff is an ignorant man, unable to read or write, and that defendant gained his confidence through a claim of religious brotherhood. True, plaintiff had theretofore managed a farm, in rather a small way, and had accumulated sufficient to satisfy the necessities of life, with enough remaining to induce him to seek life in town. He was introduced to defendant as one who had town property to exchange for land. After some negotiations, the parties each viewed the lands and lots of the other, and propositions pro and con were made, resulting in an agreement for exchange. Plaintiff valued his lands at twenty dollars per acre; and defendant, his lots at sixteen hundred dollars. Finally it was agreed that plaintiff's property was to be taken at three thousand five hundred, and defendant's at sixteen hundred dollars. Defendant was also to give plaintiff personal property valued at one hundred dollars, and was also to assign to him notes and accounts to the amount of two thousand five hundred dollars. ⁴²⁸ Whether this assignment was absolute, or was intended as security for the remainder of the purchase price, is one of the ques-

tions in dispute. We are constrained to believe that plaintiff's version of the matter is correct—as it is the more reasonable—and that the assignment was to be as security for eighteen hundred dollars, which defendant agreed to pay as the remainder of the consideration for the land. But this does not determine the controversy, for the reason that the oral contract was presumptively merged into the written one, which is set out at the beginning of this opinion, and, unless it was made under such circumstances as to justify its reformation, plaintiff must fail. We are well satisfied that plaintiff was mistaken as to the contents or legal effect of the instrument when he signed it. But this, in itself, is not sufficient to justify reformation. Defendant must also have been mistaken as to its contents or legal effect, or must, with knowledge of plaintiff's erroneous conclusion, have been guilty of such fraud or inequitable conduct as will justify reformation. After Hamilton had reduced the contract to writing, he read it to Williams, and Williams thereupon remarked that he did not just understand it; that there was one thing mentioned that it did not say anything about, as he understood it, and that was that, if he did not get his money in two years, he did not see anything about what Hamilton would do. To which Hamilton said, "Brother Williams, I guarantee it covers everything we have agreed on." Williams then remarked, "If that is so, it is all right," and thereupon signed the contract. This may have been a mistake of law, taken advantage of by Hamilton. But it is well settled that a mistake of law may, under certain circumstance, afford ground for relief in equity: *Lee v. Percival*, 85 Iowa, 639; *Winans v. Huyck*, 71 Iowa, 459; *Stafford v. Feters*, 55 Iowa, 484, and cases cited. ⁴²⁰ Appellants contend, however, that appellee was negligent in signing the contract without informing himself as to its contents or legal effect, and that he cannot have relief. It must be remembered that appellee could neither read nor write, and that he was compelled to rely upon the appellant for a correct reading of the instrument. Had he signed it without informing himself of its contents, or had he signed after hearing it read, and without more, there is no doubt that his negligence would have barred him of recovery, under the rule announced in *Glenn v. Statler*, 42 Iowa, 107, and *McCormack v. Molburg*, 43 Iowa, 561, and other like cases. But the appellee did not do this. On the contrary, he called attention to what he supposed was an omission in the contract, and was assured by appellant that it covered everything agreed upon. Here, then, was a mutual mistake

as to the legal effect of the terms used, or mistake on the part of appellee coupled with fraud or inequitable conduct on the part of appellant. Appellant knew that appellee was relying upon him to properly express the terms of the oral agreement in the writing, and it was his duty, under the circumstances disclosed, to correctly represent the condition and effect of the written instrument. In relying upon this representation, appellee was not negligent, and the instrument should be reformed to express the agreement as represented.

Appellants further contend that appellee afterward ratified the agreement as written. A few days after the making of the agreement, the parties met to carry it out. Present at this meeting, besides the parties, was a notary public, and a minister of the denomination to which both belonged. Deeds and bills of sale were made out in execution of the contract, and the contract was read over to the parties. Just how Myers, the minister, came to be there, is not definitely shown, although we incline to the belief ⁴³⁰ that it was at the request of Williams to witness some of the papers. In any event, he signed one of the deeds as a witness. Just prior to the execution of the papers in consummation of the agreement, Williams and Myers withdrew to one side, and had some conversation about them. Myers did not, however, read the contract to Williams, nor is there any evidence that he explained, or attempted to explain, it to him. That he did look over the deeds and other instruments seems clear, but there is no evidence that he understood the purport of the written instrument, or that he in any way or manner indicated to Williams its effect. Before there could be any ratification on the part of Williams, it must appear that he knew and understood the contents of the paper which it is claimed he ratified. As there is no showing of any such knowledge, there was, of course, no ratification.

Appellant Maggie Hamilton contends that the decree, which established a lien upon the property for the amount of the judgment, is erroneous, for the reason that she is a bona fide purchaser for value, and without notice. An examination of the evidence leads us to believe that she was conversant with the terms of the oral agreement, and that the conveyance to her was in furtherance of an attempt to procure the property without paying an adequate consideration therefor.

We have gone to the transcript for a better understanding of the record, and, while we have not attempted to set out the evidence upon which we base our conclusions, we have given the case careful consideration, and find the ultimate facts to be as

stated. There are many circumstances, small in themselves, which point to the correctness of the conclusion reached. And, as the decree of the district court is manifestly equitable and just, it is affirmed.

Reformation of Contracts.

Jurisdiction.—A court of law has no jurisdiction to reform written instruments: *Bush v. Merriman*, 87 Mich. 260; *Ivinson v. Hutton*, 98 U. S. 79; even upon evidence that would justify a court of equity in so doing: *American Cent. Ins. Co. v. Simpson*, 43 Ill. App. 98; *Prentice v. Stearns*, 113 U. S. 435; although in the case of a mere clerical error, apparent on the face of an instrument, and where the case is plain in its facts and in its law, there would seem to be no necessity to invoke equitable interposition, as in correcting a mistake in the description of land devised by will: *Thomson v. Thomson*, 115 Mo. 56. Compare monographic note to *Goode v. Goode*, 66 Am. Dec. 633-637, on reforming and correcting wills in equity. But, while courts of law have no such jurisdiction, courts of equity have not hesitated to entertain jurisdiction to reform all deeds or contracts where there has been an innocent omission or insertion of a material stipulation, contrary to the intention of both parties, and under a mutual mistake; or where there has been a mistake on one side and fraud or inequitable conduct on the other: *Pulaski Iron Co. v. Palmer*, 89 Va. 384; *Simmons Creek Coal Co. v. Doran*, 142 U. S. 417; *Walden v. Skinner*, 101 U. S. 577; *Snell v. Insurance Co.*, 98 U. S. 85, 89; *Ivinson v. Hutton*, 98 U. S. 79; *Hunt v. Rousmanier*, 8 Wheat. 174; *Sanders v. Wagner*, 32 N. J. Eq. 506; *Wilson v. Stewart*, 63 Ind. 294; *Stevens v. Hertzler*, 114 Ala. 563. The reformation of written instruments, when by mistake or by fraud they express more or less than the parties intended, is a well-established branch of equity jurisdiction: *Franklin v. Jones*, 22 Fla. 526. Thus, equity has jurisdiction to reform a policy of insurance even after an action at law thereon has been defeated: *Equitable Ins. Co. v. Hearne*, 20 Wall. 494, 495. While equity has jurisdiction to reform executed contracts by enlarging or restricting the subject matter, there is a hopeless conflict of authority upon the question whether a court of equity will correct an executory contract on the ground of fraud or mistake, and enforce it with the variation: *Davis v. Ely*, 104 N. C. 16; 17 Am. St. Rep. 667. That oral testimony cannot be received in equity, in the case of an executory contract for the sale of land, to reform the written contract on account of mutual mistake or fraud, and to specifically enforce it as reformed, especially where the object is to enlarge the subject matter, see *Macomber v. Peckham*, 16 R. I. 485. In England, and several of the United States, relief by reforming an executory contract within the statute of frauds on the ground of fraud or mistake, and enforcing it with the variation, is denied, although a defendant, for the purpose of resisting specific performance, may show that, by fraud or mistake, the written contract does not express the real

terms of the agreement: See *Davis v. Ely*, 104 N. C. 16; 17 Am. St. Rep. 667; *Macomber v. Peckham*, 16 R. I. 485. In other states, this distinction is repudiated, and the contract will be corrected and enforced, in proper cases at the instance of either party, whether the object is to restrict the subject matter of the contract or to enlarge it. This view seems to predominate in the American authorities.

If a deed, note, or written agreement, insurance policy, or other contract, omits or contains terms or stipulations contrary to the intention, agreement, or understanding of the parties, a court of equity will, upon the proper showing of mutual mistake or fraud, reform the written instrument so as to make it conform to such intention, agreement, or understanding: *Stephenson v. Elliott*, 53 Kan. 550; *Harvey's case*, 13 Ct. of Cl. 822; *Foster v. Schmeer*, 15 Or. 363; *Petesich v. Hambach*, 48 Wis. 443; *Green Bay etc. Canal Co. v. Hewitt*, 62 Wis. 316; *Silbar v. Ryder*, 63 Wis. 106; *Sullivan v. Bruhling*, 66 Wis. 472; *Lee v. Wagner*, 71 Wis. 191; *Kennard v. George*, 44 N. H. 440; *Grossbach v. Brown*, 72 Wis. 458; *Kessel v. Kessel*, 79 Wis. 289; *Braun v. Wisconsin etc. Co.*, 92 Wis. 245; *Trustees v. Delaware Ins. Co.*, 93 Wis. 57; *Damm v. Moon*, 48 Mich. 510; *Probett v. Walters*, 70 Mich. 437; *Burns v. Caskey*, 100 Mich. 94; *Bay v. Barnett*, 58 Iowa, 344; *Stafford v. Fetters*, 55 Iowa, 484; *Lee v. Percival*, 85 Iowa, 639; *Foley v. Hamilton*, 89 Iowa, 686; *Cake v. Peet*, 49 Conn. 501; *Butler v. Barnes*, 60 Conn. 170; *Kellogg v. Chapman*, 30 Fed. Rep. 882; *Meeks v. Stillwell*, 54 Ohio St. 541; *Whitehead v. Brown*, 18 Ala. 682; *Larkins v. Biddle*, 21 Ala. 252; *Trapp v. Moore*, 21 Ala. 693; *Houston v. Fall*, 86 Ala. 232, 233; *Fuller v. Hawkins*, 60 Ark. 304; *Gladdish v. Godchaux*, 46 La. Ann. 1571; *Cleghorn v. Zumwalt*, 83 Cal. 155; *Lestrade v. Barth*, 19 Cal. 660, 673; *Beall v. Martin*, 48 Neb. 479; *Lear v. Prather*, 89 Ky. 501; *Tichenor v. Yankey*, 89 Ky. 508; *Hansford v. Freeman*, 99 Ga. 376; *Fowler v. Vreeland*, 44 N. J. Eq. 268; *Trusdell v. Lehman*, 47 N. J. Eq. 218; *Tatem v. Powell*, 50 N. J. Eq. 316; *Mercantile Ins. Co. v. Jaynes*, 87 Ill. 199; *Day v. Day*, 84 N. C. 408; *McClure v. Little*, 15 Utah, 379; 62 Am. St. Rep. 938; *Rice v. Kelset*, 42 Minn. 511; *Canedy v. Marcy*, 13 Gray, 373; *Nowlin v. Pyne*, 47 Iowa, 293; *Ryder v. Ryder*, 19 R. I. 188; *Ray v. Ferrell*, 127 Ind. 570; *Parish v. Camplin*, 139 Ind. 1; *Merchants' etc. Assn. v. Scanlan*, 144 Ind. 11; *Citizens' Nat. Bank v. Judy*, 146 Ind. 322; *Graves v. Boston Marine Ins. Co.*, 2 Cranch, 419; *Hunt v. Rousmaniere*, 1 Pet. 1; 8 Wheat. 174; *Bradford v. Union Bank*, 13 How. 57; *Snell v. Insurance Co.*, 98 U. S. 85, 89; *Walden v. Skinner*, 101 U. S. 577; *Elliott v. Sackett*, 108 U. S. 132; *Thompson v. Phenix Ins. Co.*, 136 U. S. 287. The proposition which lies at the foundation of all suits to reform is, that the court cannot make such a contract as it thinks the parties ought to have made, or would have made, if better informed, but merely makes it what the parties intended it should be: *St. Anthony Falls etc. Co. v. Merriman*, 35 Minn. 42, 49. Thus, if it is clearly established that a note and mortgage were, by mutual mistake, executed for a smaller sum than intended, equity will, as between the parties, decree a reformation in accord-

ance with the transaction as it was actually agreed upon: *Fuller v. Hawkins*, 60 Ark. 304. A deed will be reformed in equity so as to comply with the intention of the parties: *Beall v. Martin*, 48 Neb. 479. A deed may be reformed so as to express an intended trust, and thereby release lands from the apparent lien of a judgment: *Sullivan v. Bruhling*, 66 Wis. 472. So if, by accident, inadvertence, or mistake, a policy of insurance does not correctly set forth the contract personally made between the parties, it may be reformed in equity so as to express the real agreement: *Thompson v. Phenix Ins. Co.*, 136 U. S. 287; *Bishop v. Clay Ins. Co.*, 49 Conn. 167, 170. Courts of equity possess the power to correct mistakes in policies of insurance, even to the extent of changing the most material clauses: *Hearn v. Equitable etc. Ins. Co.*, 4 Cliff. 192. No written contract is beyond the reach of a court of equity for the purpose of reforming it, if the prayer for relief is timely presented: *Palmer v. Hartford Ins. Co.*, 54 Conn. 488; and reformation may be granted so as to express the mutual intentions of the parties, although such relief is sought against a married woman: *Parish v. Camplin*, 139 Ind. 1. The cause of the failure of a written contract to express the real agreement between the parties is, in the absence of fraud, not material, for the authorities generally concur in this, that if, through mistake, a written agreement contains substantially more or less than the parties to it intended, or, from ignorance or want of skill in the draughtsman, the object and intention of the parties as contemplated by the agreement is not expressed in the written instrument by reason of the use of inapt expressions, equity will, upon clear and satisfactory proof of such mistake, interpose and reform the agreement, so as to make it conformable to the true intent of the contracting parties: *Trapp v. Moore*, 21 Ala. 693, 697; *Larkins v. Biddle*, 21 Ala. 252; *Trusdell v. Lehman*, 47 N. J. Eq. 218; *Nowlin v. Pyne*, 47 Iowa, 298; *Cake v. Peet*, 49 Conn. 601. If, by reason of a grantor's ignorance of the law, a deed of gift drawn by himself does not express his intention, it may be reformed in equity: *Larkins v. Biddle*, 21 Ala. 252; *Meeks v. Stillwell*, 54 Ohio St. 541.

Courts of equity, in the exercise of their jurisdiction to reform written instruments, proceed with the utmost caution: *Ohlander v. Dexter*, 97 Ala. 476; *Hearn v. Equitable etc. Ins. Co.*, 4 Cliff. 192; *Bishop v. Clay Ins. Co.*, 49 Conn. 167; and equity will not reform an instrument so as to give it an effect contrary to the intent of the parties: *Meeks v. Stillwell*, 54 Ohio St. 541; *Nagel v. Schneider*, 83 Mich. 407. In other words, equity will deny the reformation of a contract, as well as grant it, to effectuate the intention of the parties: *Nagel v. Schneider*, 83 Mich. 407. Equity will not, for the purpose of reforming a contract, insert in it a provision which was omitted therefrom with the consent of the party asking the reformation, although such consent was given in reliance upon an oral promise of the other party that the omission should make no difference: *Braun v. Wisconsin Rendering Co.*, 92 Wis. 245. The "intention" meant, in saying that equity will reform a written agreement so as to express and carry out the intention of the parties,

is the intention of both parties as to something upon which their minds actually met: *Trustees v. Delaware Ins. Co.*, 93 Wis. 57; and equity will reform a written instrument, for fraud or mistake, only so far as to give effect to a previous binding contract of the parties: *Petesch v. Hambach*, 48 Wis. 443; *Bancharel v. Patterson*, 64 Minn. 454.

To justify the reformation of a written instrument, fraud or mistake must appear: *Martini v. Christensen*, 60 Minn. 491; *Brintnall v. Briggs*, 87 Iowa, 538; *McElderry v. Shipley*, 2 Md. 25; 56 Am. Dec. 703; *Story v. Conger*, 36 N. Y. 673; 93 Am. Dec. 546; *Gaffney Mercantile Co. v. Hopkins*, Montana, March, 1898; *Sanford v. Gates*, Montana, July, 1898; *Bigelow v. Wilson*, 99 Iowa, 456; *Welles v. Yates*, 44 N. Y. 525. If mistake is relied upon, it must be mutual, or there must be mistake on one side and fraud or inequitable conduct on the other. In such cases equity will afford relief: *Simmons Creek Coal Co. v. Doran*, 142 U. S. 417; *Crookston Imp. Co. v. Marshall*, 57 Minn. 333; 47 Am. St. Rep. 612; *Henderson v. Beasley*, 137 Mo. 199; *Koons v. Blanton*, 129 Ind. 383; *Martini v. Christensen*, 60 Minn. 491; *Bowers v. New York Life Ins. Co.*, 68 Fed. Rep. 785, 787; *Hay v. Star Fire Ins. Co.*, 77 N. Y. 235; 33 Am. Rep. 607. If inequitable conduct or fraud is relied upon, it should clearly appear that there was some relation of trust or confidence between the parties that has been abused, or that there was fraud, or fraud on one side accompanied by mistake on the other, or that the means of knowing the facts were not equally open to both parties: *Kleinsorge v. Rohse*, 25 Or. 51, 54. It must also be made to appear what the actual contract between the parties was, and that the written contract exhibited does not express the contract made: *Slobodisky v. Phenix Ins. Co.*, 52 Neb. 395; *Bishop v. Clay Ins. Co.*, 49 Conn. 167; for there can be no reformation where there was never any contract: *Bancharel v. Patterson*, 64 Minn. 454, 456. Rescission is the proper remedy in such a case: *Bancharel v. Patterson*, 64 Minn. 454. The form in which relief will be given, when a mistake in a material particular is established in a written agreement, must necessarily depend upon the circumstances of the particular case. Courts of equity have a wide discretion in such matters, their object being to give parties the same beneficial result which would have flowed from the agreement had the mistake never existed: *Lestrade v. Barth*, 19 Cal. 660, 674. "The jurisdiction of courts of equity," said Field, C. J., in *Lestrade v. Barth*, 19 Cal. 660, 672, "to correct an error in any material particular of a written agreement, either executory or executed, so as to make the instrument conform to the intention of the parties, is well settled. And it matters not whether the error be in the insertion or omission of a material stipulation; or, as alleged in the present case, in an inaccurate description of the subject matter of the agreement. Nor does it make any difference whether the error be the result of fraud in one of the parties, or be committed under a mutual mistake, contrary to the intention of both parties."

A court of equity may reform a written contract, for fraud or mistake, and enforce it as reformed, in the same suit: *Jarnatt v.*

Cooper, 59 Cal. 703; Hallam v. Corlett, 71 Iowa, 446; Ham v. Johnson, 51 Minn. 105; Murdoch v. Leonard, 15 Wash. 142; Willis v. Henderson, 4 Scam. 13; 38 Am. Dec. 120; Popplein v. Foley, 61 Md. 381; Cubberly v. Cubberly, 89 N. J. Eq. 514; Mercantile Ins. Co. v. Jaynes, 87 Ill. 199; Kelley v. McKinney, 5 Lea, 164; Hay v. Star etc. Ins. Co., 77 N. Y. 235; 33 Am. Rep. 607; Harvey v. United States, 105 U. S. 671; Bradford v. Union Bank, 13 How. 57; Brugger v. State etc. Ins. Co., 5 Saw. 304. Thus, a mortgage may be reformed and foreclosed in the same action; Jarnatt v. Cooper, 59 Cal. 703; and an action to reform a defective acknowledgment made by a married woman may be joined with an action for foreclosure: Hutchinson v. Ainsworth, 63 Cal. 286. But a contract required to be in writing must be wholly in writing before it can be enforced: Carskaddon v. South Bend, 141 Ind. 596. A mortgage which does not describe the land intended to be mortgaged cannot be reformed and foreclosed against a subsequent bona fide purchaser of the land; but such a mortgage may be reformed and foreclosed against a subsequent purchaser with notice of the mistake: Pence v. Armstrong, 95 Ind. 191, 197.

While a court of chancery will, upon proof of fraud, accident, mistake, or surprise, raise an equity by which an agreement will be rectified according to the intention of the parties, it will not interfere, where the instrument is such as the parties themselves designed it to be. If they voluntarily choose to express themselves in the language of a written contract, they must be bound by it, for there is no general rule better settled, or more just in itself, than that parties who enter into contracts, and especially contracts in writing, must be governed by them as made, according to their true intent and meaning, and must submit to the legal consequences arising from them: Dixon v. Clayville, 44 Md. 573, 578; Middleton v. Newport Hospital, 16 R. I. 319, 329; Trapp v. Moore, 21 Ala. 693; showing that if an instrument speaks the true agreement between the parties, equity will not reform it because one or both of them may have mistaken its legal consequences, or misconceived its efficiency. As the only ground upon which a court of equity is authorized to reform a deed, mortgage, or written contract is that, by reason of fraud or mistake, it is different from what the parties intended to have it, equity has no jurisdiction to reform the writing if there is no fraud, accident, or mistake alleged or proved: Shenandoah Valley R. R. Co. v. Dunlap, 86 Va. 346; Hinton v. Citizens' Mut. Ins. Co., 63 Ala. 488; Hunt v. Rhodes, 1 Pet. 1; Martin v. Hamlin, 18 Mich. 354; 100 Am. Dec. 181; Fehlberg v. Oosine, 16 R. I. 162; Kennerty v. Etiwan Phosphate Co., 21 S. O. 226; 53 Am. Rep. 669; Roundy v. Kent, 75 Iowa, 662; Chute v. Quincy, 156 Mass. 189; Baltzer v. Raleigh etc. R. R. Co., 115 U. S. 634; Climer v. Hovey, 15 Mich. 18; Husted v. Van Ness, 1 N. Y. App. Div. 120; Grubb's Appeal, 90 Pa. St. 228. A court of chancery will not take cognizance of a suit brought nominally to reform an instrument, but really to obtain a judicial construction making its meaning certain: Husted v. Van Ness, 1 N. Y. App. Div. 120. Compare Grubb's Appeal, 90 Pa. St. 228. A court of

equity will not reform an instrument where there is an adequate remedy at law or under the statute: *Smith v. Griswold*, 95 Iowa, 684; *Oldham v. First Nat. Bank*, 85 N. C. 240. It will only decree the reformation of an instrument as a means of enabling a party thereto to assert or maintain some right thereunder: *Thompson v. Phoenix Ins. Co.*, 25 Fed. Rep. 296, 298. The reformation of a mortgage, though not legally necessary, may be decreed, if it will be practically useful as evidence of title: *Sherman v. Hanno*, 66 N. H. 160, 166.

Courts of equity will not reform instruments "unless the true state of the case can be established": *Persinger v. Chapman*, 93 Va. 349, 352; and "he who seeks equity must do equity." In all cases where a party asks for the reformation of a deed, mortgage, or other written instrument, he must stand upon some equity superior to that of the party against whom he asks relief: *Conaway v. Gore*, 21 Kan. 725. If the only relief sought is the reformation of a deed, mortgage, or other contract, a previous demand for correction is essential; but if, in addition to the reformation, a recovery is asked, no prior demand is necessary: *Citizens' Nat. Bank v. Judy*, 146 Ind. 322; *Sparta School Tp. v. Mendell*, 138 Ind. 188; *Axtel v. Chase*, 83 Ind. 546. Compare *Meyer v. Lathrop*, 73 N. Y. 315. Thus, in a suit to reform and foreclose a mortgage, it is unnecessary to allege or prove a request to reform the instrument, but it is otherwise if the suit is only to reform the mortgage, or a deed: *Axtel v. Chase*, 83 Ind. 546; *Walls v. State*, 140 Ind. 16. And it is not necessary to allege a prior request for the correction of a mistake in a contract when facts are stated which show that it would have been a vain and useless formality: *Weathers v. Hill*, 92 Ala. 492. Compare *quaere* in *Miller v. Louisville etc. R. R. Co.*, 83 Ala. 274; 3 Am. St. Rep. 722.

A written agreement, while it exists, must control as to all the terms expressed therein, although they may differ from the prior oral agreement of the parties. Hence, if suit is brought upon the true agreement, the written contract must first, as a condition precedent, be reformed to correspond with it, where the difference is caused by fraud or mistake: *Linton v. Unexcelled Fireworks Co.*, 128 N. Y. 672; *Parker v. Schaller Sav. Bank*, 98 Iowa, 246; *Sun Ins. Co. v. Greenville Bldg. Assn.*, 58 N. J. L. 367. A court of equity will refuse reformation where that question is unnecessarily brought into an action: *Watson v. O'Neill*, 14 Mont. 197, 200; or where the case is weak in its equities and the property to be affected is insignificant in value: *Backus v. Jeffrey*, 47 Mich. 127. Damages may be sought in an action of trespass in which the reformation of a deed is prayed for: *Prater v. Bennett*, 98 Ga. 413. A city council's resolution, not having the qualities of a contract, cannot be so reformed as to give it the quality and force of a contract: *Carskaddon v. South Bend*, 141 Ind. 596.

Mistake may be relieved by a court of equity: *Snell v. Insurance Co.*, 98 U. S. 85, 89. But to justify the reformation of a contract on the ground of mistake, it must be mutual, as we shall show further on; and, for the present, we shall pass over the question

whether, in such cases, a court of equity will relieve against a mistake of law as well as of fact. Equity will reform an instrument for mistake, but it will not make a new one for the parties. When it is clearly shown that the parties to a deed, mortgage, insurance policy, or other contract, by reason of a mistake, did not effect what they intended, a court of equity will perfect their intention by reforming the instrument: *Neininger v. State*, 50 Ohio St. 394; 40 Am. St. Rep. 674, and note; *Beardsley v. Knight*, 10 Vt. 185; 33 Am. Dec. 193; *Price v. Cutts*, 29 Ga. 142; 74 Am. Dec. 52; *Baldwin v. National Hedge etc. Co.*, 73 Fed. Rep. 574; *National Fire Ins. Co. v. Crane*, 16 Md. 260; 77 Am. Dec. 289; *Moore v. Vick*, 2 How. 746; 32 Am. Dec. 301; *Smith v. Allen*, 1 N. J. Eq. 43; 21 Am. Dec. 33; *Iverson v. Wilburn*, 65 Ga. 103; *Crookston Imp. Co. v. Marshall*, 57 Minn. 333; 47 Am. St. Rep. 612; *Miller v. McCarty*, 47 Minn. 321; 28 Am. St. Rep. 375; *Larkins v. Biddle*, 21 Ala. 252; *Clark v. Hart*, 57 Ala. 390; *Kennard v. George*, 44 N. H. 440. Some cases hold that a court of equity will not reform a deed, mortgage, or other contract for mistake unless it is one of fact; that it is for mistake of fact alone, and not of law, that contracts may be reformed: *Purvines v. Harrison*, 151 Ill. 219, 224; *Ruffner v. McConnel*, 17 Ill. 212; 63 Am. Dec. 362; *Burns v. Caskey*, 100 Mich. 94; *Fowler v. Black*, 136 Ill. 363; but the remedy of reformation has been administered, or recognized, in numerous cases, where the mistake was in the legal effect of the terms of the instrument, the court drawing no distinction between mistake of fact and mistake of law: See *Neininger v. State*, 50 Ohio St. 394; 40 Am. St. Rep. 674; *Beardsley v. Knight*, 10 Vt. 185; 33 Am. Dec. 193; *Price v. Cutts*, 29 Ga. 142; 74 Am. Dec. 52; *National Fire Ins. Co. v. Crane*, 16 Md. 260; 77 Am. Dec. 289; *Morgan v. Dod*, 3 Colo. 551; *Shear v. Robinson*, 18 Fla. 379, 459; *Larkin v. Biddle*, 21 Ala. 252; *Reed v. Root*, 59 Iowa, 359; *Kennard v. George*, 44 N. H. 440; and in other cases it has been expressly held that a deed, mortgage, or other contract may be reformed for mistake of law or the legal effect of the instrument, as well as for mistake of fact, where it does not fulfill, or violates, the manifest intention of the parties thereto: *Leitensdorfer v. Delphy*, 15 Mo. 160; 55 Am. Dec. 137; *Benson v. Markoe*, 37 Minn. 30; 5 Am. St. Rep. 816; *Moore v. Tate*, 114 Ala. 582; *Park v. Blodgett*, 64 Conn. 28; *Parish v. Camplin*, 139 Ind. 1; *Allen v. Elder*, 76 Ga. 674; 2 Am. St. Rep. 63; *McNaughten v. Partridge*, 11 Ohio, 223; 38 Am. Dec. 731; *Evants v. Strobe*, 11 Ohio, 480; 38 Am. Dec. 744; *Cassidy v. Metcalf*, 66 Mo. 519, 529; *Hearn v. Equitable etc. Co.*, 4 Cliff. 192; *Bailey v. American Cent. Ins.*, 4 McCrary, 221; *Brock v. O'Dell*, 44 S. O. 22; *Michigan Buggy Co. v. Woodson*, 59 Mo. App. 550; *Walden v. Skinner*, 101 U. S. 577, 583. Compare *Hunt v. Rousmanier*, 1 Pet. 14; 8 Wheat. 174; *Roemer v. Conlon*, 45 N. J. Eq. 234, 236; *Reed v. Root*, 59 Iowa, 359; *Clark v. Hart*, 57 Ala. 390; *Kennard v. George*, 44 N. H. 440; *Eastman v. Provident Mutual Relief Assn.*, 65 N. H. 176; 23 Am. St. Rep. 29.

It is said, in many cases, that a mere mistake of law, without other circumstances with respect to a deed, mortgage, or other written contract, is no ground for the "high" remedy of reformation in

a court of equity: *Snell v. Insurance Co.*, 98 U. S. 85, 90; *United States Bank v. Daniel*, 12 Pet. 32; *Woolworth v. McPherson*, 55 Fed. Rep. 558; *Kelly v. Turner*, 74 Ala. 513; *Trapp v. Moore*, 21 Ala. 693; *Middleton v. Newport Hospital*, 16 R. I. 319; *Martin v. Hamlin*, 18 Mich. 354; 100 Am. Dec. 181; *Ohlander v. Dexter*, 97 Ala. 476; *Hershey v. Luce*, 56 Ark. 320; *Rector v. Collins*, 46 Ark. 167; 55 Am. Rep. 571; *Toops v. Snyder*, 70 Ind. 554; *Easter v. Severin*, 78 Ind. 540; *Williamson v. Hitner*, 79 Ind. 233; *Anderson v. Tydings*, 8 Md. 427; 63 Am. Dec. 708; *Cochran v. Pew*, 159 Pa. St. 184; *Thompson v. Thompson*, 18 Ohio St. 73, 83; *Archer v. California Lumber Co.*, 24 Or. 341; *Weed v. Weed*, 94 N. Y. 243; *Calverly v. Harper*, 40 Ill. App. 96; *Fowler v. Black*, 136 Ill. 363; and it has been held that equity will not reform a contract for mistake of law where there is no mistake of fact: *Leavitt v. Palmer*, 8 N. Y. 19; 51 Am. Dec. 333; but we understand these cases to hold that a court of equity will not reform a written contract because of a mistake of legal rights or of law, when the mistake was made with a full knowledge of the facts and without fraud: *Loftus v. Fischer*, 106 Cal. 616; *Deseret Nat. Bank v. Burton*, Utah, April, 1898. In other words, if the instrument embodies the real agreement between the parties, equity will not reform it because one or both of them may have mistaken its legal consequences, or questions of law respecting the subject matter of the contract: See *Trapp v. Moore*, 21 Ala. 693; *Kelly v. Turner*, 74 Ala. 513; *Marshall v. Westrope*, 98 Iowa, 324; *Mitchell v. Holman*, 30 Or. 280; *Ohlander v. Dexter*, 97 Ala. 476. The use of language which is thought by the parties to mean what the law says it does not mean, is not a basis of mistake for the reformation of a contract: *Cochran v. Pew*, 159 Pa. St. 184. Thus, if a written instrument accurately expresses the intent and meaning of parties thereto, the fact that it is a conditional sale, which they believe to be a mortgage, does not change the character or effect of the agreement: *Hershey v. Luce*, 56 Ark. 320.

This view tends to harmonize the apparently conflicting cases on the subject, for it is certainly true that, when the terms of an agreement, employed by the parties, result in a contract different from the one really entered into, by reason of omission, ignorance, or misapprehension of their legal effect, a court of equity will reform it to effectuate the intention of the parties: *Moore v. Tate*, 114 Ala. 582; *Walden v. Skinner*, 101 U. S. 577; *Evants v. Strode*, 11 Ohio, 480; 38 Am. Dec. 744; *Bailey v. American Cent. Ins. Co.*, 4 McCrary, 221; *Brock v. O'Dell*, 44 S. C. 22; *Elliott v. Sackett*, 108 U. S. 132, 141; *Clark v. Hart*, 57 Ala. 390; *Reed v. Root*, 59 Iowa, 359; *Ryder v. Ryder*, 19 R. I. 188; *Trusdell v. Lehman*, 47 N. J. Eq. 218; *Marshall v. Westrope*, 98 Iowa, 324. As said in *Walden v. Skinner*, 101 U. S. 577, 583: "Decisions of undoubted authority hold that where an instrument is drawn and executed that professes or is intended to carry into execution an agreement, which is in writing or by parol, previously made between the parties, but which, by mistake of the draughtsman, either as to fact or law, does not fulfill, or which violates the manifest intention of the parties to the agreement, equity will correct the mistake so as to produce a conformity of the instru-

ment to the agreement, the reason of the rule being that the execution of agreements fairly and legally made is one of the peculiar branches of equity jurisdiction, and if the instrument intended to execute the agreement be from any cause insufficient for that purpose, the agreement remains as much unexecuted as if the party had refused altogether to comply with his engagement, and a court of equity will, in the exercise of its acknowledged jurisdiction, afford relief in the one case as well as in the other, by compelling the delinquent party to perform his undertaking according to the terms of it and the manifest intention of the parties."

A perusal of the adjudged cases also justifies the statement that the distinction between errors of law and errors of fact is of much less importance in the reformation of contracts than is commonly supposed, that it has had very little practical effect upon the decisions of the courts, and that, while not ignored, it is not unfrequently mixed up with other considerations which outweigh it. "It is no longer true, if it ever was," says Torrance, J., in *Park v. Blodgett*, 64 Conn. 28, 33, "that a mistake of law is no ground for relief in any case, as will be seen by the cases hereinafter cited. Whether, then, the mistake now in question be regarded as one of law or one of fact is not of much consequence; the more important question is, whether it is such a mistake as a court of equity will correct; and this, perhaps, can only, or at least can best, be determined by seeing whether it falls within any of the well-recognized classes of cases in which such relief is furnished." While it is true that mere mistake of law, unattended by other circumstances affecting the case, does not justify the reformation of a contract, which is drawn as the parties intended, yet equity will interfere if it appears that the defendant, availing himself of the opportunities afforded by the mistake, will take an unconscionable advantage, without consideration, the plaintiff being blameless, and the defendant being in no position entitling him to equitable protection: *Benson v. Markoe*, 37 Minn. 30; 5 Am. St. Rep. 816. An honest mistake of law, on the part of both parties to a written contract, as to the effect of the instrument, may be relieved in equity by way of reformation of the contract where the mistake operates as a gross injustice to one and gives an unconscientious advantage to the other: *Allen v. Elder*, 76 Ga. 674; 2 Am. St. Rep. 63. "If, after making an agreement, in the process of reducing such agreement to a written form, the writing, by means of a mistake of the law, fails to express the contract which the parties actually entered into, equity will interfere to reform it or to prevent its enforcement to the same extent as if the failure of the writing to express the real contract was caused by a mistake of fact. In this instance, there is no mistake as to the legal import of the contract actually made, but the mistake of law prevents the real contract from being embodied in the written instrument": *Pomeroy on Contracts*, sec. 234; approved and applied in *Reed v. Root*, 59 Iowa, 359; *Larkins v. Biddle*, 21 Ala. 252; *Clark v. Hart*, 57 Ala. 390; *Marshall v. Westrope*, 98 Iowa, 324. In general, a mistake, either of fact or of law, made by one party only to an instrument, does not justify the reformation of it, but relief is

sometimes granted, in special cases of this kind, when the parties can be replaced in their former position: *Benson v. Markoe*, 37 Minn. 30; 5 Am. St. Rep. 816; *Truesdale v. Sidle*, 65 Minn. 315.

A mistake of law is an erroneous conclusion as to the legal effect of known facts. The construction of words is a matter of law. So, if parties instruct an officer to prepare a quitclaim deed for their execution, but he draws a deed containing language which amounts in law to a covenant of title in fee, and they sign the deed, knowing that such language is in it, they are held to have been mistaken in the law, that is to say, in the legal effect of the language used, and in the legal consequences of retaining such language in the deed. But a mistake of fact is a mistake, not caused by the neglect of a legal duty on the part of the person making the mistake, and consisting in an unconscious ignorance or forgetfulness of a fact, past or present, material to the contract, or belief in the present existence of a thing material to the contract which does not exist, or in the past existence of a thing which has not existed: *Purvines v. Harrison*, 151 Ill. 219, 223, per Magruder, J.

To justify the reformation of a deed, mortgage, settlement, or other contract, on the ground of mistake, unmixed with fraud, the authorities are unanimous that the mistake must be mutual or common to both parties. A mistake, error, or misconception of one of the parties only is not enough, and the mistake must be about, or material to, the contract: *Purvines v. Harrison*, 151 Ill. 219; *Moffett Co. v. Rochester*, 82 Fed. Rep. 255, 256; *Reeder v. Gorsuch*, 55 Kan. 553; *Andrews v. Andrews*, 81 Me. 337; *Harvey's case*, 13 Ct. of Cl. 322; *Dulany v. Rogers*, 50 Md. 524; *Whitesides v. Taylor*, 105 Ill. 496; *Douglas v. Grant*, 12 Ill. App. 273; *Benson v. Markoe*, 37 Minn. 30; 5 Am. St. Rep. 816; *Green v. Stone*, 54 N. J. Eq. 387; 55 Am. St. Rep. 577; *Stockbridge Iron Co. v. Hudson Iron Co.*, 102 Mass. 45, 48; *Clark v. Higgins*, 132 Mass. 586, 589; *Coates v. Buck*, 93 Wis. 128; *Martini v. Christensen*, 60 Minn. 491; *Ranney v. McMullen*, 5 Abb. N. C. 246; *Norman v. Norman*, 26 S. C. 41; *Ramsey v. Smith*, 32 N. J. Eq. 28; *Farley v. Deslonde*, 69 Tex. 458; *Smith v. Mackin*, 4 Lans. 41; *Fishack v. Ball*, 34 W. Va. 644; *Eames Vacuum Brake Co. v. Prosser*, 88 Hun, 343; *Carskaddon v. South Bend*, 141 Ind. 596; *Chute v. Quincy*, 156 Mass. 189; *Lott v. Kaiser*, 61 Tex. 665; *Welles v. Yates*, 44 N. Y. 525; *Ruffner v. McConnel*, 17 Ill. 212; 63 Am. Dec. 362; *Bigelow v. Wilson*, 99 Iowa, 456; *Burns v. Caskey*, 100 Mich. 94; *Trustees v. Delaware Ins. Co.*, 93 Wis. 57; *New York Life Ins. Co. v. McMaster*, 87 Fed. Rep. 63; *Deseret Nat. Bank v. Burton*, Utah, April, 1898; *Home Fire Ins. Co. v. Wood*, 50 Neb. 381; *Bartlett v. Brown*, 121 Mo. 353; *White v. Port Huron etc. Ry. Co.*, 13 Mich. 356, note; *Fehlberg v. Cosine*, 16 R. I. 162; *Webster v. Stark*, 10 Lea, 406, 413; *Marshall v. Westrope*, 98 Iowa, 324.

"The phrase 'mutual mistake,' as used in equity, means a mistake common to all the parties to a written contract or instrument, and it usually relates to a mistake concerning the contents or the legal effect of the contract or instrument": *Page v. Higgins*, 150 Mass. 27, 31. A court of equity will not reform a written agreement, on the ground of mistake, so as to impose on one of the par-

ties obligations which he did not intend to assume: *New York Life Ins. Co. v. McMaster*, 87 Fed. Rep. 63. If one party to a contract makes a clerical error in reducing the terms agreed upon to writing, which is either shared in or known to be a mistake by the other party at the time of the execution of the agreement, it is sufficient ground for decreeing a reformation: *Trenton etc. Co. v. Clay Shingle Co.*, 80 Fed. Rep. 46. A court of equity will not rectify a written contract or agreement for mistake unless both parties did that which neither of them intended. A mistake on one side may be ground for rescinding, but not for reforming a written agreement: *Douglas v. Grant*, 12 Ill. App. 273; *Dulany v. Rogers*, 50 Md. 524; *Fehlberg v. Cosine*, 16 R. I. 162. A contract for the sale of lands cannot be reformed for a mistake not in the contract itself, or in the writing embodying it, but of an extrinsic fact, which, if known, would probably have induced the parties to make a different contract: *Webster v. Stark*, 10 Lea, 406, 413. But a court of equity may reform a contract for a mistake which exists, not in the instrument which is intended to give effect to the agreement, but in the agreement itself: *Hunt v. Rhodes*, 1 Pet. 1. The question of mutual mistake is one of fact and not of law: *Tooley v. Chase*, 26 Or. 600; *Whipperman v. Dunn*, 124 Ind. 349, 357. Compare *Hartford etc. R. R. Co. v. Jackson*, 24 Conn. 514; 63 Am. Dec. 177. For illustrations of mutual mistake of fact, see *Purvines v. Harrison*, 151 Ill. 219; *Andrews v. Andrews*, 81 Me. 337; *Crowe v. Lewin*, 95 N. Y. 423; *Riegel v. American Life Ins. Co.*, 140 Pa. St. 193; 23 Am. St. Rep. 225; *MacVeagh v. Burns*, 2 S. Dak. 83; *Wood v. Michaud*, 63 Minn. 478; *Williams v. Everham*, 90 Iowa, 420; *Brown v. Cranberry etc. Coal Co.*, 82 Fed. Rep. 351; *Holt v. Holt*, 120 Cal. 67; *Trenton etc. Co. v. Clay Shingle Co.*, 80 Fed. Rep. 46; *Darmour v. Chapman*, 2 N. Y. App. Div. 112; *Griffith v. Sebastian County*, 49 Ark. 25; *McKenzie v. McKenzie*, 52 Vt. 271; *Comstock v. Coon*, 135 Ind. 640; *Parish v. Campbell*, 139 Ind. 1; *Cleghorn v. Zumwalt*, 83 Cal. 155; *Bay v. Harnett*, 58 Iowa, 344; *Baker v. Pyatt*, 108 Ind. 61.

For facts held not to constitute a mutual mistake, see *Loud v. Barnes*, 154 Mass. 344; *Harvey's case*, 13 Ct. of Cl. 322; *Dulany v. Rogers*, 50 Md. 524; *Douglas v. Grant*, 12 Ill. App. 273; *Comer v. Granniss*, 75 Ga. 277; *Martini v. Christensen*, 60 Minn. 491; *Ranney v. McMullen*, 5 Abb. N. C. 246; *Norman v. Norman*, 26 S. C. 41; *Pasman v. Montague*, 30 N. J. Eq. 385; *Trustees v. Delaware Ins. Co.*, 93 Wis. 57; *New York Life Ins. Co. v. McMaster*, 87 Fed. Rep. 63; *Fehlberg v. Cosine*, 16 R. I. 162; *Marshall v. Westrope*, 98 Iowa, 324; *Citizens' Nat. Bank v. Judy*, 146 Ind. 322; *Eames Vacuum Brake Co. v. Prosser*, 88 Hun, 343; *De Voin v. De Voin*, 76 Wis. 66; *Morris v. Penrose*, 88 N. J. Eq. 629; *Chute v. Quincy*, 156 Mass. 189; *Breneiser v. Davis*, 141 Pa. St. 85; *Loftus v. Fischer*, 106 Cal. 616; *Fitschen v. Thomas*, 9 Mont. 52; *Bancharel v. Patterson*, 64 Minn. 454; *Lott v. Kaiser*, 61 Tex. 665; *Clark v. Hart*, 57 Ala. 390; *Iverson v. Wilburn*, 65 Ga. 103.

Evidence.—It is well-settled law that, in suits to reform deeds, mortgages, or other written contracts on the ground of fraud or mutual mistake parol evidence is always admissible to establish the fact of

fraud or of a mistake, and in what it consisted, and to show how the writing should be corrected in order to conform to the agreement which the parties actually made. This is necessary in order to prevent fraud and injustice: *Gillespie v. Moon*, 2 Johns. Ch. 585; 7 Am. Dec. 559; *Fudge v. Payne*, 86 Va. 303, 307; *Rowley v. Flannelly*, 30 N. J. Eq. 612, 614; *Tilton v. Tilton*, 9 N. H. 385; *Dunham v. Chatham*, 21 Tex. 231; 73 Am. Dec. 228; *Yates v. Cole*, 1 Jones Eq. 110; 59 Am. Dec. 602; *Popplein v. Foley*, 61 Md. 381; *Levy v. Ward*, 33 La Ann. 1033; *Jones v. Sweet*, 77 Ind. 187; *Morris v. Stern*, 80 Ind. 227; *Snell v. Insurance Co.*, 98 U. S. 85, 89; *Hunt v. Rousmanier*, 8 Wheat. 174; *Walden v. Skinner*, 101 U. S. 577; *Hathaway v. Brady*, 23 Cal. 121; *Pierson v. McCahill*, 23 Cal. 249; *Purvines v. Harrison*, 151 Ill. 219; *Craven v. Butterfield*, 80 Ind. 503; *Moale v. Buchanan*, 11 Gill & J. 314, 325; *Elliott v. Sackett*, 108 U. S. 132, 141; *Lott v. Kaiser*, 61 Tex. 665; *Moore v. Vick*, 2 How. 746; 32 Am. Dec. 301. Contra, *Elder v. Elder*, 10 Me. 80; 25 Am. Dec. 205.

If an instrument contains a mistake apparent upon its face, a court of equity may reform the writing without parol testimony to prove the mistake, as, for instance, where a seal is omitted from a deed, though it purports to be under seal, or where there is no granting clause, though there are words of warranty: *Michel v. Tinsley*, 69 Mo. 442. A mistake, though it arises from the carelessness of the parties themselves, and not of a scrivener, in drawing and signing a deed, may be proved for the purposes of a reformation: *Baldwin v. National Hedge etc. Co.*, 73 Fed. Rep. 574. So, in an action to reform a written substituted contract for fraud or mistake, and to enforce the same when reformed, or, if it cannot be reformed, then to rescind the written contract, the original writing, made by the same parties upon the subject matter in dispute, may be given in evidence and also the subsequent acts done, or procured to be done, by the party charged with the fraud and which tend to prove the fraud or mistake: *Railroad Co. v. Steinfeld*, 42 Ohio St. 449. See, also, *Stahn v. Hall*, 10 Utah, 400. When reformation is sought of a deed which, through fraud or mistake, conveyed less land than was orally bought and paid for, the case does not stand as if there were no deed; and the error may be corrected without proof of such part performance as is necessary for a decree of specific performance compelling a conveyance of the whole land when no part of it has been conveyed: *Hitchins v. Pettingill*, 58 N. H. 386, 389, and cases there collected. It is held in *Nebraska Loan etc. Co. v. Ignowski*, Nebraska, April, 1898, that a person who seeks to rectify a deed on the ground of mistake must establish, in the clearest and most satisfactory manner, that the alleged intention to which he desires it to be made conformable continued concurrently in the minds of all parties down to the time of its execution; otherwise, a reformation of the instrument will not be accorded. The maker of a deed, knowing both its contents and legal effect, cannot, in the absence of fraud, avoid its effect by parol proof that he intended it to convey a different estate: *Lott v. Kaiser*, 61 Tex. 665; and a court of chancery will not, by the aid of parol evidence, rectify an agreement for the sale of lands and then enforce it as rectified, in a case where

the agreement is contained in two independent writings, and, by mistake, each of the parties signs only the writing intended to be signed by the other: *Osborn v. Phelps*, 19 Conn. 63; 48 Am. Dec. 133.

In order to establish mistake in an instrument, it is sufficient to show that the parties had agreed to accomplish a particular object by the instrument to be executed, and that the instrument as executed is insufficient to effect the object: *Leltensdorfer v. Delphy*, 15 Mo. 160; 55 Am. Dec. 137; and to justify the reformation of a deed, mortgage, or other written contract, on the ground of mistake, the evidence must show clearly and satisfactorily, not only that the writing does not truly express the intention of the parties, but also what they intended it to express, or what the actual contract was: *Guilmartin v. Urquhart*, 82 Ala. 570; *Slobodisky v. Phenix Ins. Co.*, 52 Neb. 395; *Bishop v. Clay Ins. Co.*, 49 Conn. 167. It must appear that the precise terms of a contract had been orally agreed upon between the parties, and that the written instrument afterward signed fails to be, as it was intended, an execution of the previous agreement, but expresses a different contract; and that this is the result of a mutual mistake: *German American Ins. Co. v. Davis*, 131 Mass. 316. If there is no antecedent agreement to which the writing can be conformed, it is clear that reformation, on the ground of mistake, must be refused: *St. Anthony etc. Co. v. Merriman*, 85 Minn. 42.

In a suit for the reformation of a deed, mortgage, insurance policy, or other written contract, on the ground of mistake or fraud, the complainant must make out a perfectly clear case, free from doubt. The evidence, not only of the agreement actually made, but of the mutuality of the mistake, must be "clear, convincing, and satisfactory," for "courts of equity do not grant the high remedy or reformation upon a probability, nor even upon a mere preponderance of the evidence, but only upon a certainty of the error": *Pomeroy's Equity Jurisprudence*, sec. 859; *Harding v. Long*, 103 N. C. 1; 14 Am. St. Rep. 775; *Gillespie v. Moon*, 2 Johns. Ch. 585; 7 Am. Dec. 559; *Board of Commrs. v. Owens*, 138 Ind. 183, 187; *German American Ins. Co. v. Davis*, 131 Mass. 316; *Bishop v. Clay Ins. Co.*, 49 Conn. 167; *Purvines v. Harrison*, 151 Ill. 219; *Moore v. Tate*, 114 Ala. 582; *Slobidsky v. Phenix Ins. Co.*, 52 Neb. 395; *Green v. Stone*, 54 N. J. Eq. 387; 55 Am. St. Rep. 577; *Benson v. Markoe*, 37 Minn. 30; 5 Am. St. Rep. 816; *Hutchinson v. Ainsworth*, 73 Cal. 452; 2 Am. St. Rep. 823; *Sawyer v. Hovey*, 3 Allen, 331; 81 Am. Dec. 659, and note; *Warrick v. Smith*, 36 Ill. App. 619; *Allen v. Elder*, 76 Ga. 674; 2 Am. St. Rep. 63; *Ruffner v. McConnel*, 17 Ill. 212; 63 Am. Dec. 362; *Northfield Ins. Co. v. Sweet*, 46 Ill. App. 598; *Griswold v. Hazard*, 26 Fed. Rep. 135; *Harrison v. Hartford Fire Ins. Co.*, 30 Fed. Rep. 862; *Van Vleet v. Sledge*, 45 Fed. Rep. 743; *Baldwin v. National Hedge etc. Co.*, 67 Fed. Rep. 853; *Bowers v. New York Life Ins. Co.*, 68 Fed. Rep. 785; *Baltzer v. Raleigh etc. R. R.*, 115 U. S. 634, 645; *Baldwin v. National Hedge etc. Co.*, 73 Fed. Rep. 574; *Bowers v. New York Life Ins. Co.*, 68 Fed. Rep. 785; *New York Life Ins. Co. v. McMaster*, 87 Fed. Rep. 63; *Hearn v. Equitable etc. Ins. Co.*, 4 Cliff. 192; *Lestrade v. Barth*, 19 Cal. 660; *Jarnatt v. Cooper*, 59 Cal. 703; *Oox v. Woods*, 67 Cal. 317; *Bishop v. Clay Ins. Co.*, 49 Conn. 167;

Franklin v. Jones, 22 Fla. 526; McDonnell v. Milholland, 48 Md. 540; Stiles v. Willis, 66 Md. 552; Shepard v. Shepard, 36 Mich. 173; Vary v. Shea, 36 Mich. 388; White v. Port Huron Ry. Co., 13 Mich. 356; Bates v. Bates, 56 Mich. 405; Burns v. Caskey, 100 Mich. 94; Bartlett v. Brown, 121 Mo. 353; Henderson v. Beasley, 137 Mo. 199; Parker v. Vanhoozer, 142 Mo. 621; Home Fire Ins. Co. v. Wood, 50 Neb. 381; Rowley v. Flannelly, 30 N. J. Eq. 612, 614; Smith v. Allen, 1 N. J. Eq. 43; 21 Am. Dec. 33; Greer v. Caldwell, 14 Ga. 207; 58 Am. Dec. 553; Ramsey v. Smith, 32 N. J. Eq. 28; Cummins v. Bulgin, 37 N. J. Eq. 476; Roemer v. Conlon, 45 N. J. Eq. 234, 236; Green v. Stone, 54 N. J. Eq. 387; 55 Am. St. Rep. 577; Kornegay v. Everett, 99 N. C. 30; Penfield v. New Rochelle, 18 N. Y. App. Div. 83; Remillard v. Prescott, 8 Or. 37; McCoy v. Bayley, 8 Or. 196; Stafford v. Giles, 135 Pa. St. 411; Thayer v. Seep, 168 Pa. St. 414; Deseret Nat. Bank v. Burton, Utah, April, 1898; Pulaski Iron Co. v. Palmer, 89 Va. 384; Donaldson v. Levine, 93 Va. 472; Jarrell v. Jarrell, 27 W. Va. 743; Fishack v. Ball, 34 W. Va. 644; Sable v. Maloney, 48 Wis. 331; Meiswinkel v. St. Paul etc. Ins. Co., 75 Wis. 147; Conant v. Estate of Kimball, 95 Wis. 550.

In some cases, it is said that the evidence must be clear, "exact," and satisfactory: *Ex parte Ashhurst*, 100 Ala. 573; *Moore v. Tate*, 114 Ala. 582, 584; *Sawyer v. Hovey*, 3 Allen, 331; 81 Am. Dec. 659; in others that it must be clear, "precise," and indubitable: *Brenelser v. Davis*, 141 Pa. St. 85; *Boyertown Nat. Bank v. Hartman*, 147 Pa. St. 558; 30 Am. St. Rep. 759; *Sylvius v. Kosek*, 117 Pa. St. 67; 2 Am. St. Rep. 645; and in others, that the evidence must be of such weight and directness as to establish the facts alleged, not only by a preponderance of evidence, but beyond a reasonable doubt; *Boyertown Nat. Bank v. Hartman*, 147 Pa. St. 558; 30 Am. St. Rep. 759; *Stockbridge Iron Co. v. Hudson Iron Co.*, 102 Mass. 45; *Muller v. Rhuman*, 62 Ga. 332; *Hervey v. Savery*, 48 Iowa, 313; *Hupsch v. Resch*, 45 N. J. Eq. 657, 662; *Fudge v. Payne*, 86 Va. 303; though it has been held that one who seeks to have a deed reformed on the ground that it was procured by fraud may establish his case by a clear preponderance of the evidence, without making it so conclusive as to leave no room for doubt: *Archer v. California Lumber Co.*, 24 Or. 341; *Harding v. Long*, 108 N. C. 1; 14 Am. St. Rep. 775; and that to reform a contract on the ground of mistake it is enough to establish the case by satisfactory proofs, without establishing it beyond a reasonable doubt: *Southard v. Curley*, 134 N. Y. 148; 30 Am. St. Rep. 642; *Strayer v. Stone*, 47 Iowa, 333. It is sometimes said that the evidence in such cases must be clear, "positive," and convincing: *Christopher etc. R. R. Co. v. Twenty-third St. Ry. Co.*, 149 N. Y. 51; and that no reformation will be granted except upon a "very convincing preponderance" of evidence in favor of the complainant: *Reynolds v. Campbell*, 45 Mich. 529, 531. The rule which expresses the degree of proof required in the reformation of contracts for fraud or mistake is stated in various ways by the courts, even of the same state, but whatever may be its form, the evidence must be sufficiently cogent to thoroughly satisfy the mind of the court that fraud has been committed or that a mistake has been made: *Simmons*

Creek Coal Co. v. Doran, 142 U. S. 417, 435. The mistake may, of course, be admitted, but if not, it should be proved as much to the satisfaction of the court as if admitted: **Ford v. Joyce**, 78 N. Y. 618. The rule requiring the evidence to be "clear, convincing, and satisfactory," does not necessarily preclude relief because the testimony is conflicting: **Hutchinson v. Ainsworth**, 73 Cal. 452; 2 Am. St. Rep. 823; **Baldwin v. National Hedge etc. Co.**, 73 Fed. Rep. 574; though there are doubtless many cases in which reformation would not be granted where the mistake is strongly denied: **Green v. Stone**, 54 N. J. Eq. 387; 55 Am. St. Rep. 577. In suits for the reformation of deeds, mortgages, or other written contracts, on the ground of mistake, the burden is upon the complainant to show the mistake and that it was mutual: **Purvines v. Harrison**, 151 Ill. 219; **Howland v. Blake**, 97 U. S. 624, 628; **Donaldson v. Levine**, 93 Va. 472; **Tyson v. Chestnut**, 100 Ala. 571; **Moore v. Tate**, 114 Ala. 582; **Parker v. Vanhoozer**, 142 Mo. 621; but the burden is on the defendant to show such acquiescence on the part of the complainant, after knowledge of a mistake, as to render it inequitable to grant the relief asked: **Roszell v. Roszell**, 109 Ind. 354.

If the evidence, in an action for the reformation of a deed, mortgage, insurance policy, or other contract, is clear, satisfactory, and convincing that fraud has been committed, or that a mutual mistake has been made, it is sufficient to justify a reformation, but such sufficiency must necessarily depend upon the special circumstances of each particular case: **West v. West**, 90 Iowa, 41; **Critchfield v. Kline**, 89 Kan. 721; **Dod v. Paul**, 43 N. J. Eq. 302; **Knox v. Lycoming Fire Ins. Co.**, 50 Wis. 671; **Stafford v. Gilles**, 135 Pa. St. 411, 417; **Walt v. Axford**, 63 Mich. 227; **Johnson v. Wilson**, 111 Mich. 114; **Osterhout etc. Lumber Co. v. Rice**, 93 Mich. 353; **Harding v. Wright**, 138 Mo. 11, 16; **Weathers v. Hill**, 92 Ala. 492; **Pacific Mut. Life Ins. Co. v. Frank**, 44 Neb. 320; **Osborn v. Ketchum**, 25 Or. 352; **Kraushaar v. Hauk**, 27 Or. 92; **Layman v. Minneapolis Realty Co.**, 60 Minn. 136; **Martini v. Christensen**, 60 Minn. 491; **Ward v. Waterman**, 85 Cal. 488, 504; **Wilson v. Moriarty**, 88 Cal. 207; **Haack v. Welcken**, 118 N. Y. 67; **Murdoch v. Leonard**, 15 Wash. 142; **Kropp v. Kropp**, 97 Wis. 137. Otherwise, reformation must be refused for want of proof: **Burnell v. Morris**, 106 Ala. 349; **Moore v. Tate**, 114 Ala. 582; **Dean v. Equitable Fire Ins. Co.**, 4 Cliff. 575; **Baltzer v. Raleigh etc. R. R.**, 115 U. S. 634, 645; **Habbe v. Viele**, 148 Ind. 116; **George v. Howard**, 56 Iowa, 646; **Des Moines County etc. Soc. v. Tubbessing**, 87 Iowa, 138, 141; **Osmundson v. Thompson**, 90 Iowa, 755; **Taylor v. Shoridan**, 91 Iowa, 720; **Kemmerer v. Owens**, 91 Iowa, 737; **Rensink v. Wiggers**, 99 Iowa, 39; **Hoyer v. King**, 101 Iowa, 363; **Linscott v. Linscott**, 83 Me. 384; **German American Ins. Co. v. Davis**, 131 Mass. 316; **Harris v. Smith**, 40 Mich. 453; **Gilchrist v. Kelley**, 85 Mich. 413; **St. Anthony Falls etc. Co. v. Merriman**, 35 Minn. 42; **Fanning v. Doan**, 139 Mo. 392; **Parker v. Vanhoozer**, 142 Mo. 621; **Home Fire Ins. Co. v. Wood**, 50 Neb. 381; **Moran v. McLarty**, 75 N. Y. 25; **Allison etc. Co. v. Allison**, 144 N. Y. 21; **Weed v. Whitehead**, 1 N. Y. App. Div. 192; **Greene v. Smith**, 13 N. Y. App. Div. 459; **Ray v. Commissioners**, 110 N. C. 169; **Boyertown Nat. Bank v. Hartman**, 147 Pa. St.

558; 30 Am. St. Rep. 759; McClain v. Smith, 158 Pa. St. 49; Liggett v. Shira, 159 Pa. St. 350; Fudge v. Payne, 86 Va. 303; Meade v. Norfolk etc. R. R. Co., 89 Va. 296. Thus, the reformation of a deed will be denied where it is not clearly shown that the parties to the contract intended to convey a particular piece of land other than the one described in the deed: Seward v. Spurgeon, 9 Wash. 74. A policy of insurance will not be reformed unless the evidence is clear and convincing, beyond reasonable controversy, that the correction asked expressed the understanding of both parties thereto at the time it was executed: Meiswinkel v. St. Paul etc. Ins. Co., 75 Wis. 147. If the contracting parties were experienced business men, and the contract was executed and delivered, and its terms were clear and explicit in every part, a court of equity will not reform the contract, at the request of the defendant, where the testimony for the plaintiff decidedly supports his contention that the writing sued on expresses the real contract: Vaughn v. Digman, Ky., Nov. 1897. Wherever the evidence leaves the matter in doubt, so that the mistake is not made entirely plain, equity will withhold relief on the ground that the written paper must be treated as a full and correct expression of the intent of the parties until the contrary is established beyond reasonable controversy: Cullinane v. District of Columbia, 18 Ct. of Cl. 577, 594.

Pleading.—Equity will reform written contracts upon proper averments and proof: Tyson v. Chesnut, 100 Ala. 571. We have seen what the proof must be, and fraud or mistake must be pleaded before the equitable power of reformation can be invoked: Anderson v. Logan, 105 N. C. 266, 271, either affirmatively or defensively; Moore v. Vick, 2 How. 746; 32 Am. Dec. 301; Leltensdorfer v. Delpry, 15 Mo. 160; 55 Am. Dec. 137; Barlow v. Elliott, 56 Mo. App. 374. A court of equity cannot reform a written contract for fraud or mistake, unless the fraud or mistake is alleged in the complaint or answer, for matters not charged in the bill or averred in the answer are not in issue: Burley v. Weller, 14 W. Va. 264; Cox v. Esteb, 68 Mo. 110; Gamble v. Daugherty, 71 Mo. 599; Sanford v. Nyman, 23 Mich. 326. In a suit to reform a written contract, the complaint should show the original agreement of the parties, should point out clearly wherein the writing differs from the agreement, and that such difference was caused by fraud or mutual mistake, and did not arise from the gross negligence of the plaintiff: Lewis v. Lewis, 5 Or. 170; Hyland v. Hyland, 19 Or. 51; Osborn v. Ketchum, 25 Or. 352; Durham v. Fire etc. Ins. Co., 22 Fed. Rep. 468; Meier v. Kelly, 20 Or. 86; Fly v. Brooks, 64 Ind. 50; Christensen v. Hollingsworth, Idaho, May, 1898; Schoonover v. Dougherty, 65 Ind. 463; Walls v. Mallott, 140 Ind. 16; Comstock v. Coon, 135 Ind. 640; Taylor v. Deverell, 43 Kan. 469; Citizens' Nat. Bank v. Judy, 146 Ind. 322; Anderson v. Jarrett, 43 W. Va. 246. Otherwise, the complaint is insufficient and demurrable: Ramsey v. Smith, 32 N. J. Eq. 28; Norris v. Colorado etc. Co., 22 Colo. 162; Brintnall v. Briggs, 87 Iowa, 538; Rowe v. Horton, 65 Tex. 89. Thus, upon a bill to reform a warrant drawn on the wrong fund of a city treasury, the complainant must allege and prove that the treasurer has in his hands sufficient funds to meet

the order and applicable to that purpose: *East St. Louis v. Rumsey Mfg. Co.*, 34 Ill. App. 458. In order to have a written contract reformed on the ground of mistake, the pleader should state why the terms of the actual contract happened to be left out, or how terms not agreed upon came to be inserted: *Foster v. Schmeer*, 15 Or. 363. The fact that a complaint, in an action for the reformation of a mortgage, does not, in express terms, aver that the instrument was erroneously executed through "mutual mistake," does not render the pleading insufficient if it sets up facts from which such a conclusion is inevitable: *Murdoch v. Leonard*, 15 Wash. 142. See, also, *Prater v. Bennett*, 98 Ga. 413. In a suit to correct an alleged mistake in a deed, the complaint should state some circumstances relating to the nature or situation of the property, which show that an unfair advantage has been gained by the defendant through the mistake, and that it is against good conscience to allow the mistake to stand: *Lewis v. Lewis*, 5 Or. 169, 176. In a bill to reform a policy of insurance, it is sometimes permissible to charge fraud or mistake in the alternative: *Bowers v. New York Life Ins. Co.*, 68 Fed. Rep. 785. Allegations in a bill for the reformation of a written contract on the ground of accident and mistake, that the terms of the contract were agreed upon, that they were to be put in writing by the plaintiff, and that both plaintiff and defendant executed the writing under the mistaken impression that it did conform to the prior verbal agreement, fully meet an objection that the bill states merely a case of unilateral mistake in making a "proposition": *Providence Steam-Engine Co. v. Hathaway Mfg. Co.*, 79 Fed. Rep. 512. The reformation of a deed is fairly within a prayer for general relief in equity: *Haslett v. Stephany*, 55 N. J. Eq. 68, 78. A plea to a bill in equity which seeks to reform a deed and mortgage is insufficient if it does not meet the issues raised by the bill, or set up any defense in bar of the equity of the bill: *Cranston Print Works v. Dyer*, 18 R. I. 526. If a bill to reform a deed alleges a mistake of the scrivener, by which a fee was conveyed, instead of an intended life estate, and the proof is that parties to the deed, by deception, caused the grantors to sign it, there is a fatal variance: *Adams v. Gill*, 158 Ill. 190; but there is no substantial or material variance where the complaint avers a "mutual" mistake, while the findings are that the mistake was that of the plaintiff, and that the defendant knew of such mistake at the time: *Holt v. Holt*, 120 Cal. 67. The defense that a clause in a deed assuming to pay a mortgage debt was inserted by mistake, must be set up by cross-bill, and all of the parties interested must be made parties thereto: *Green v. Stone*, 54 N. J. Eq. 387; 55 Am. St. Rep. 577.

Fraud.—Much has already been said about fraud, in a general way, as it figures in suits for the reformation of contracts, but it probably deserves some further and special consideration. It is clear that the reformation of a contract may be had for fraud or inequitable conduct on one side and mistake on the other: *Bancharel v. Patterson*, 64 Minn. 454, 456; *Citizens' Nat. Bank v. Judy*, 146 Ind. 322; *New York Life Ins. Co. v. McMaster*, 87 Fed. Rep. 63; *Marshall v. Westrope*, 98 Iowa, 324; *Archer v. California Lumber Co.*, 24 Or.

341; *Hay v. Star Fire Ins. Co.*, 77 N. Y. 235; 33 Am. Rep. 607; *Lott v. Kaiser*, 61 Tex. 665; *Bush v. Merriman*, 87 Mich. 260; *Prater v. Bennett*, 98 Ga. 413; *Winans v. Huyck*, 71 Iowa, 459. Thus, if one whose duty it is to prepare a written contract according to a previous agreement, prepares one materially different from the agreement, by changing its terms, and delivers it as in accordance with such agreement, he commits a fraud which entitles the deceived party to a reformation: *Hansford v. Freeman*, 99 Ga. 376; *McDonald v. Yungbluth*, 46 Fed. Rep. 836; *Hay v. Star Fire Ins. Co.*, 77 N. Y. 235; 33 Am. Rep. 607; *Bergen v. Ebey*, 88 Ill. 269. See, also, *Pulaski Iron Co. v. Palmer*, 89 Va. 384. If stipulations are kept out of a contract by fraud, the contract may be reformed in equity, and specifically enforced: *Cubberly v. Cubberly*, 39 N. J. Eq. 514. Equity may reform a deed for fraud notwithstanding the plaintiff's negligence: *Hitchins v. Pettingill*, 58 N. H. 3. Equity will relieve against a mistake, either of law or of fact, where it is produced by misleading statements or representations of the other party to the contract: *Lott v. Kaiser*, 61 Tex. 665; *Bales v. Hunt*, 77 Ind. 355, 360; *Snell v. Insurance Co.*, 98 U. S. 85, 91. A mistake of law as to a contract, caused by fraud, imposition, or misrepresentation may be relieved against in equity: *Kyle v. Fehley*, 81 Wis. 67; 29 Am. St. Rep. 866; *Bush v. Merriman*, 87 Mich. 260, 269. As between parties standing on an equality, inadequacy of price is not of itself sufficient ground for reformation, yet it is a material fact, which, taken in connection with other facts, may amount to proof of fraud or mistake such as will warrant a reformation: *Baldwin v. National Hedge etc. Co.*, 73 Fed. Rep. 574; and it has been held that equity has jurisdiction of a suit to set aside a settlement and reform a deed given in pursuance thereof, because of fraud on the part of the grantor in including therein land to which he had no title, notwithstanding the existence of a concurrent remedy at law on the covenants of the deed: *Hancock v. Cassett*, 45 Fed. Rep. 754; for, where fraud or mistake is the ground of relief, the jurisdiction of a court of equity is not ousted by a concurrent remedy at law: *Hancock v. Cassett*, 45 Fed. Rep. 754, 755.

If no fraud is proved on one side, there can, of course, be no reformation, notwithstanding a mistake or ignorance of fact on the other: *Archer v. California Lumber Co.*, 24 Or. 841; *Ranney v. McMullen*, 5 Abb. N. C. 246; *Pasman v. Montague*, 30 N. J. Eq. 385; *Prescott v. Cooper*, 87 La. Ann. 553; *Raymond v. Cox*, 44 N. J. Eq. 415; *Monks v. McGrady*, 71 Tex. 134; *Hollenback's Appeal*, 121 Pa. St. 322; *Martini v. Christensen*, 60 Minn. 491; *Rushton v. Hallett*, 8 Utah, 277; *Comer v. Granniss*, 75 Ga. 277; *Chute v. Quincy*, 156 Mass. 189. "The rules of evidence at law and in equity," says Champlin, C. J., in *Bush v. Merriman*, 87 Mich. 260, 268, "are the same, but when the question is not what the terms of the written contract are, but whether the contract as written was entered into, or whether it was obtained by fraud, or is founded in surprise, accident, or mistake, these subjects of inquiry are open to parol testimony, irrespective of what the writing contains."

The fact that one of the parties to a contract, whatever may be

its subject matter, is ignorant and illiterate, does not justify its reformation, though it may be otherwise where some relation of trust or confidence existed between the parties, or there was fraud or misrepresentation, or if the means of knowledge as to the terms and conditions of the contract were not equally open and accessible to both parties: *Archer v. California Lumber Co.*, 24 Or. 341; *Allen v. Elder*, 76 Ga. 674; 2 Am. St. Rep. 63; *Comer v. Granniss*, 75 Ga. 277; *Hunt v. Rousmaniere*, 1 Pet. 1; *Mason v. Pelletier*, 82 N. C. 40. Thus, if a deed is executed by an ignorant and illiterate person, in reliance upon the agent for the grantee, to whom he has intrusted its preparation, it will be reformed in equity, where it does not express the real contract made between the parties, and it appears that the grantor believed that the agent was his attorney, and relied entirely on him to properly prepare the instrument: *Archer v. California Lumber Co.*, 24 Or. 341. So, if an aged German woman, unacquainted with business forms, has agreed to convey land subject to a lease, and is subsequently induced by the false representations of the grantee to execute a warranty deed, making no mention of such lease, she is entitled to have the deed reformed in equity so as to conform it to the agreement of the parties: *Kyle v. Fehley*, 81 Wis. 67; 29 Am. St. Rep. 866. Compare *West v. West*, 90 Iowa, 41. If the relation of parties to a contract is one of confidence, as where they are mother and son, and the mother, at the time of executing the contract, has a failing or weak mind, arising from suffering or old age, the same degree of vigilance and care is not expected or required as in ordinary dealings of men with each other, to authorize the reformation of the contract: *Purvines v. Harrison*, 151 Ill. 219; *West v. West*, 90 Iowa, 41.

Section 3399 of the Civil Code of California provides that: "When, through fraud or a mutual mistake of the parties, or a mistake of one party, which the other knew or suspected, a written contract does not truly express the intention of the parties, it may be revised on the application of a party aggrieved, so as to express the intention, so far as it can be done without prejudice to rights acquired by third persons, in good faith and for value"; and it has been held that, where one of the parties to a written agreement knew at the time of its execution that it did not truly express the intention of the parties, and also knew that the other party signed it supposing the intention to be correctly expressed, a case for revision is made out under this section, and that the right of revision does not depend upon the fact that he might have discovered the mistake before he signed the instrument: *Higgins v. Parsons*, 65 Cal. 280. If a lessor executes a lease, understanding it to be for a single term of five years, but which, in reality, is a lease for a term of ten years, with the privilege of renewal, and the lessee knows that the lessor so understands it, and fraudulently induces him to misunderstand it, and to execute it under such misunderstanding, the lessor is entitled, under the section of the code named above, to have the lease reformed, as the only fraud necessary to sustain the judgment reforming the lease is such as may be inferred from the failure of the lessee to correct the mistake of the lessor, known or sus-

pected by the lessee at the time of the execution of the lease: *Vinson v. Morlarity*, 88 Cal. 207. If one party to a contract is mistaken either as to law or fact, and the other, with knowledge, contracts with him, equity will relieve upon the ground of fraud: *State v. Paup*, 13 Ark. 129; 56 Am. Dec. 303; *Weaver v. Van Akin*, 71 M. D. 77. The latter, having such knowledge, and remaining silent when he should speak, is estopped to defeat a reformation by asserting a want of mutuality in the mistake: *Roszell v. Roszell*, 109 Ind. 354. It is the duty of one who applies for a policy of insurance to read and know the contents of a policy before accepting it, and, if he fails to do so, he is estopped from denying knowledge thereof, unless he proves that he was dissuaded from reading it by some trick or fraud of the other party: *New York Life Ins. Co. v. McMaster*, 87 Fed. Rep. 63. In a suit to correct articles of agreement dissolving a partnership, equity will not correct a mistake where the parties to the instrument had equal knowledge, or equal means of obtaining knowledge, of the mistake, and there was no concealment, surprise, or imposition: *Belt v. Mehen*, 2 Cal. 159; 56 Am. Dec. 329.

Negligence.—If a party to a deed, mortgage, contract of insurance, or other contract, through his own negligence, signs it without knowing or understanding its contents, when he has an opportunity to do so, a court of equity will not reform it so as to make it express his alleged understanding of what it was to contain, for an error which is the result of inexcusable negligence is not a mistake from the consequences of which equity will grant relief. The bare fact that one does not read a contract or know its contents, when he executes it, does not relieve him from it. If he can read his contract, his failure to do so is such gross negligence that it conclusively estops him from denying knowledge of its contents, unless he was dissuaded from reading it by some trick, artifice, or fraud of the other party to the agreement. Equity will not extend its aid to one who has been guilty of culpable negligence, and it requires that the party who asks relief on the ground of mutual mistake shall have exercised at least the degree of diligence which may be fairly expected from a reasonable person. Equity will not, therefore, relieve against mistake, by way of reformation, when the party complaining had within his reach the means of ascertaining the true state of facts, and, without being induced thereto by the other party, neglected to avail himself of his opportunities for information: *Roundy v. Kent*, 75 Iowa, 662; *Marshall v. Westrope*, 98 Iowa, 324; *Pope v. Hoopes*, 84 Fed. Rep. 927; *New York Life Ins. Co. v. McMaster*, 87 Fed. Rep. 63, 67; *Quimby v. Shearer*, 56 Minn. 534; *Persinger v. Chapman*, 93 Va. 349, 352; *Brown v. Fagan*, 71 Mo. 563; *Haggerty v. McCanna*, 25 N. J. Eq. 48, 51; *Voorhis v. Murphy*, 26 N. J. Eq. 434; *Bishop v. Allen*, 55 Vt. 423; *Pearce v. Suggs*, 83 Tenn. 724; *Massey v. Cotton States Life Ins. Co.*, 70 Ga. 794; *Toops v. Snyder*, 70 Ind. 554; *Iverson v. Wilburn*, 65 Ga. 103; *Kennerty v. Etiwan Phosphate Co.*, 21 S. C. 226; 53 Am. Rep. 669; *Burnell v. Morris*, 106 Ala. 349; *Bonney v. Stoughton*, 122 Ill. 536. Equity will not reform a written contract to correspond with the alleged intent of the parties, where one of them admits that it was read

to him before its execution, and that he was then satisfied with notwithstanding other evidence of mutual mistake: *Jurgensen v. Jorgensen*, 97 Iowa, 627. But one is not negligent in failing to read a contract before signing it, where it is read over to him by one in whom he has confidence and upon whom he has a right to rely, and is assured by such person that the paper is in accordance with the agreement: *Koons v. Blanton*, 129 Ind. 383; *Elliott v. Sackett*, 108 U. S. 132, 135. Evidence to reform a written contract is insufficient, which only shows that a third person, to whom it was intrusted merely for the purpose of delivery to the defendant, fraudulently misread it to the latter when he signed it: *Sylvius v. Kosek*, 117 Pa. St. 67; 2 Am. St. Rep. 645. The failure of a party to a written contract to read it over a second time before executing it, for the purpose of verifying erasures made in his presence and at his dictation, does not, as a matter of law, preclude him from obtaining a reformation of the contract, where it is found that the mistake was not due to his negligence, but to the error of the scrivener in making the erasures: *West v. Suda*, 69 Conn. 60. And the omission of a lessee to read a lease before executing it does not defeat his right to a reformation thereof, where he could only read the English language imperfectly and relied upon the scrivener in whom he had confidence: *Silbar v. Ryder*, 63 Wis. 106, 111. If parties between whom there is no special relation of trust or confidence execute a written instrument, it will not be reformed so as to omit a particular clause, on the ground that it was inserted by mutual mistake, if the defendant knew of the insertion at the time of executing the instrument, and the plaintiff might have known the fact had he read the instrument: *Metropolitan Loan Assn. v. Esche*, 75 Cal. 518. But equity may reform an instrument for the defendant's fraud notwithstanding the plaintiff's negligence: *Hitchins v. Pettigill*, 58 N. H. 3.

Statute of Frauds.—Notwithstanding some little diversity of opinion upon the subject, particularly with respect to executory contracts, it is clear that, in most of the cases, courts of equity reform contracts, both executed and executory, irrespective of the statute of frauds. In other words, the statute does not prevent a court from reforming the written evidence of a contract within the statute, by enlarging or restricting the terms or the subject matter of the contract, so as to make it express the real agreement whenever it is clearly shown that, by reason of fraud or mistake, either the terms or the subject matter of the contract, as it was intended and understood by the parties to it, is not embraced in the writing: *Noel v. Gill*, 84 Ky. 241, 249; *Ruhling v. Hackett*, 1 Nev. 360, 365; *Aldridge v. Weems*, 2 Gill & J. 36; 19 Am. Dec. 250; *Metropolitan Lumber Co. v. Lake Superior etc. Iron Co.*, 101 Mich. 577; *Judson v. Miller*, 100 Mich. 140; *Conaway v. Gore*, 24 Kan. 389; *McDonald v. Yungbluth*, 46 Fed. Rep. 836; *Blackburn v. Randolph*, 33 Ark. 119; *Morrison v. Collier*, 79 Ind. 417; *Thompson v. Marshall*, 36 Ala. 504; 76 Am. Dec. 328; *Johnson v. Johnson*, 8 Baxt. 261; *Finucan v. Kendig*, 109 Ill. 198. "The statute of frauds," says Judge Bennett, in *Noel v. Gill*, 84 Ky. 241, 249, "in granting such relief, is not violated, but 'is up-

lifted' that it may not perpetrate the fraud that the legislature designed it to prevent." The correction of mistakes of description in a deed is not prohibited by the statute of frauds; and, if it were, the right to plead the statute is personal, and is not available to a stranger: *Morrison v. Collier*, 79 Ind. 417; *Finucan v. Kendig*, 109 Ill. 198. An instrument within the statute of frauds may be reformed in an action brought by a party thereto who has not signed the same: *Thompson v. Marshall*, 36 Ala. 504; 76 Am. Dec. 328. The statute of frauds does no more to protect a defendant than a plaintiff against mistakes in written contracts: *Smith v. Allen*, 1 N. J. Eq. 43; 21 Am. Dec. 33. A contract required by the statute to be in writing cannot, of course, be enforced, until it is in writing: *Kidd v. Carson*, 33 Md. 37, 42; *Carskaddon v. South Bend*, 141 Ind. 596; but the statute does not interfere with the power of a court of equity to reform deeds or other instruments in which the parties intended to comply with the statute, but were prevented by fraud, accident, or mistake: *Blackburn v. Randolph*, 33 Ark. 119; *Petes v. Hambach*, 48 Wis. 443. In the case of executory contracts there are a few authorities which hold that oral testimony cannot be received in equity to reform the written contract on account of fraud or mutual mistake, and to specifically enforce it as reformed: *Macomber v. Peckham*, 16 R. I. 485; *Davis v. Ely*, 104 N. C. 16; 17 Am. St. Rep. 667; *Elder v. Elder*, 10 Me. 80; 25 Am. Dec. 205; *Glass v. Hulbert*, 102 Mass. 24; 8 Am. Rep. 418; *Osborn v. Phelps*, 19 Conn. 63; 48 Am. Dec. 133. Compare the discussion of cases in *McDonald v. Yungbluth*, 46 Fed. Rep. 836, and extended note to *Gillespie v. Moon*, 7 Am. Dec. 567-569, as to this question. The power of a court of equity to reform a written instrument, which, by reason of a mistake, fails to execute the intention of the parties, is not affected by the question as to whether the instrument is an executory or an executed agreement; nor is it material whether the proceeding is directly by bill to correct the mistake, or the mistake is set up in the answer by way of defense: *Leitensdorfer v. Delphy*, 15 Mo. 160; 55 Am. Dec. 137; *Lestrade v. Barth*, 19 Cal. 660, 672.

Judgment of Reformation.—A decree reforming a deed does not affect the rights of persons who are not parties to the suit: *Daggett v. Ayer*, 65 N. H. 82. If a contract is reformed and damages are awarded for its breach as reformed, it is not necessary for the judgment to recite that the damages were given by way of equitable relief: *West v. Suda*, 69 Conn. 60. If a decree of divorce has been rendered between a man and his wife, directing him to convey to her an undivided half of a homestead, but his deed, by mistake, conveys the whole of it, and he then brings suit for a reformation of the deed, the rights of the parties in the homestead are not affected by the suit for reformation, where the purpose of the latter suit and the effect of the judgment therein are merely to reform the deed; and where the defendant, in her answer, claims the whole of the property, she cannot complain of a judgment giving her an undivided half thereof: *Holt v. Holt*, 120 Cal. 67.

Persons against Whom Reformation may be Granted.—The jurisdiction of equity to reform or rectify a written contract when it fails,

through fraud or mistake, to express the real agreement between the parties, may be exercised as well against creditors, whether they are judgment or attaching creditors or otherwise, and purchasers having actual or constructive notice of the fraud or mistake, as between the parties themselves: *Berry v. Sowell*, 72 Ala. 14; *Carpenter Paper Co.*, 50 Neb. 659; *Penfield v. New Rochelle*, 18 N. Y. App. Div. 83; *Pence v. Armstrong*, 95 Ind. 191; *Weathers v. Hill*, 92 Ala. 492; *Smith v. Schweigerer*, 129 Ind. 363; *Parker v. Starr*, 21 Neb. 680; *Davidson v. Davidson*, 42 Ark. 362; *Smith v. Brunk*, 14 Colo. 75; *Whitehead v. Brown*, 18 Ala. 682; *Burns v. Caskey*, 100 Mich. 94; *Mayor v. Dasher*, 90 Ga. 195; *May v. Adams*, 58 Vt. 74; *Blackburn v. Randolph*, 33 Ark. 119; *Way v. Roth*, 159 Ill. 162; *Reynolds v. Haskins*, 68 Vt. 426, 428; *Shirley v. Rice*, 79 Va. 442; *Elwood v. Stewart*, 5 Wash. 736; *Bush v. Bush*, 33 Kan. 556; but not against, or to the injury of, innocent third persons, such as lienholders, bona fide purchasers without notice, and others, who have acquired intervening or vested rights, and who cannot be placed in statu quo: *Berry v. Sowell*, 72 Ala. 14; *Ingles v. Merriman*, 96 Wis. 400; *Pence v. Armstrong*, 95 Ind. 191; *New Orleans etc. Co. v. Montgomery*, 95 U. S. 16; *Toll v. Davenport*, 74 Mich. 386; *Tabor v. Cilley*, 53 Vt. 487; *Goodbar v. Dunn*, 61 Miss. 624; *Kilpatrick v. Strozler*, 67 Ga. 247; *Cass County v. Oldham*, 75 Mo. 50; *Boardman v. Taylor*, 66 Ga. 638, 649; *Davidson v. Davidson*, 42 Ark. 362; *Cottrell v. Citizens' Sav. Bank*, 53 Minn. 201; *Farley v. Deslode*, 69 Tex. 458; *Mayor v. Dasher*, 90 Ga. 195; *Day v. Day*, 84 N. C. 408; *Way v. Roth*, 159 Ill. 162; *Lough v. Michael*, 37 W. Va. 679; *Evans v. Ely*, 55 Wis. 194.

There is nothing in the registration statutes of Alabama which, as in favor of judgment creditors, forbids the reformation of a recorded mortgage by a court of equity, so as to make it include lands which were omitted by mistake: *Bailey v. Timberlake*, 74 Ala. 221. A mistake in an attempted description of mortgaged premises, in a mortgage of land, which has been duly executed and recorded, will be corrected in equity, not only as against the mortgagor, but also as against judgment or attaching creditors of the mortgagor and purchasers under them with notice of the mistake: *Strang v. Beach*, 11 Ohio St. 283; 78 Am. Dec. 308; *Citizens' Nat. Bank v. Judy*, 146 Ind. 322. A defective mortgage may reformed and enforced not only against the maker, but subsequent assignees and lienholders having notice: *Lebanon Sav. Bank v. Hollenbeck*, 29 Minn. 322. Equity will, for mistake, reform a mortgage, after record, for misdescription so as to render it superior to a judgment lien or to the title of a purchaser with notice at execution sale thereunder, although the judgment was rendered and the sale made after the mortgage was recorded and before it was reformed: *Fort Smith Milling Co. v. Mikles*, 61 Ark. 123. A deed may be reformed to speak the truth, not only as between the parties but against everybody else except bona fide purchasers without notice: *Lowe v. Allen*, 68 Ga. 225.

A mistake in the description of land cannot be corrected if the rights of persons acting in good faith, without notice, and who have parted with value or assumed a liability, have intervened: *Hewitt*

v. Powers, 84 Ind. 295. If the deed has been recorded, a mistake of description therein will not be corrected to the prejudice of the rights of bona fide judgment creditors of the grantee having a lien upon the property: **Ruppert v. Haske, 5 Mackey, 262.** Such a mistake will not be corrected against one who, having actual notice at the time of his purchase, bought the land at execution sale founded on a judgment rendered in favor of a party who had no notice of the mistake at the time he recovered judgment: **Nugent v. Priebatsch, 61 Miss. 402.** A grantor cannot be compelled to correct mistakes in his deed, so long as the grantee is in default in the payment of purchase money; and this rule extends to one who claims under the grantee, unless the original grantor has been estopped from asserting his right to exact payment: **McFadden v. Rogers, 70 Mo. 421.** Equity is willing to give the immediate parties to an instrument the privilege of correcting its errors arising from mistake when the controversy is between themselves, but is averse to permitting such corrections when the rights of strangers are involved: **Anderson v. Tydings, 8 Md. 427; 63 Am. Dec. 708.**

In cases of mistake in written contracts equity may interfere, not only as between the original parties, but those claiming under them in privity, such as personal representatives, heirs, et cetera: **Morris v. Stern, 80 Ind. 227; Whitmore v. Hay, 85 Wis. 240; 39 Am. St. Rep. 838.** See **Hutsell v. Crewse, 138 Mo. 1.** Thus, the grantor in a deed may have a mistake therein corrected against the heir at law of the grantee: **Savage v. McCorkle, 17 Or. 42;** and a mistake in a mortgage, given by a decedent, may be reformed against his widow and heirs, or devisees and administrator or executor: **Wilson v. Stewart, 63 Ind. 294.**

Laches.—The general rule is, that laches will not deprive one of his right to have a contract reformed for fraud or mistake, and upon application within a reasonable time, a court will grant relief, but it is in the discretion of the court, under all the circumstances, to grant or refuse it, and each case, with respect to delay, if there is no statute of limitations, must stand on its own peculiar facts, as no definite time is fixed within which to bring suit: **Welles v. Yates, 44 N. Y. 525; De Forest v. Walters, 153 N. Y. 229; Harris v. Ivey, 114 Ala. 363; Providence Steam-Engine Co. v. Hathaway Mfg. Co., 79 Fed. Rep. 512; Citizens' Nat. Bank v. Judy, 146 Ind. 322; Bidwell v. Astor Mut. Ins. Co., 16 N. Y. 263; note to Gillespie v. Moon, 7 Am. Dec. 569; Day v. Day, 84 N. C. 408; Metropolitan Lumber Co. v. Lake Superior etc. Canal Co., 101 Mich. 577; Schautz v. Keener, 87 Ind. 258; Wilson v. Wilson, 23 Nev. 267; Hill v. Kuhlman, 87 Fed. Rep. 498; Thompson v. Marshall, 36 Ala. 504; 76 Am. Dec. 328; Kropp v. Kropp, 97 Wis. 137; Merrifield v. Ingersoll, 61 Mich. 4; Koons v. Blanton, 129 Ind. 383; Stevens v. Hertzler, 114 Ala. 563.** If there is a statute of limitations it must govern: **Day v. Day, 84 N. C. 408; Exkorn v. Exkorn, 1 N. Y. App. Div. 124.** If there has been unreasonable delay in seeking relief it will of course be refused: **Sable v. Maloney, 48 Wis. 331; Yocum v. Foreman, 14 Bush, 494; Hurto v. Grant, 90 Iowa, 414.**

Assignment.—In accordance with the above principles, an assign-

ment of an instrument, which, by mutual mistake, does not express the real agreement between the parties, may be reformed in equity to express their intention: *Stafford v. Fetters*, 55 Iowa, 484; *Allison v. Allison*, 144 N. Y. 21; but not where the mistake is denied, or the evidence in support of it is not clear and satisfactory: *Baldwin v. National Hedge etc. Co.*, 67 Fed. Rep. 853; or where the terms of the assignment are plain, and the party seeking to reform the writing is a mere volunteer, and the other party is dead: *White v. Campbell*, 80 Va. 180. If the complainant has made an illegal assignment for the benefit of creditors, and seeks to be relieved from the consequences of it by way of reformation, to make it conform to law, the court cannot make a new and valid assignment for him, and, consequently, cannot grant him the relief he prays: *Stricker v. Tinkham*, 35 Ga. 176; 89 Am. Dec. 280.

Bills of Sale.—A court of equity may reform a bill of sale of a vessel to allow its registry and enrollment under the laws of the United States: *Sprague v. Thurber*, 17 R. I. 454; and an ordinary contract for the sale of merchandise may be reformed where the negligence of the defendant in signing the contract was not so gross as to bar him of the right of reformation on the ground of fraud and mistake: *Sutton v. Risser*, 104 Iowa, 631.

Bonds.—Equity will correct a mistake in a bond, whether the relief be sought for the purpose of enforcing the bond, or to defeat it when set up to rebut an equity: *Smith v. Allen*, 1 N. J. Eq. 43; 21 Am. Dec. 33; *Brown v. Rice*, 76 Va. 629. If a bond for title incorrectly describes the land to be conveyed, the purchaser is entitled, in a proper case, to a correction of the bond, and the mistake may be established by parol evidence: *Goff v. Jones*, 70 Tex. 573; 8 Am. St. Rep. 619. If the parties to an executor's bond fail to express their intention, through inadvertence or mistake, equity will reform the bond so as to make it conform to the intention of the parties, and the sureties will be liable upon the bond as thus reformed: *Foley v. Hamilton*, 89 Iowa, 686; but a bond made as the contracting parties intended cannot be reformed: *Middleton v. Newport Hospital*, 16 R. I. 319. If all parties to a bond in suit agree that a mutual mistake exists in its conditions, it may be corrected in equity before damages are assessed: *Lewiston v. Gagne*, 89 Me. 395; 56 Am. St. Rep. 432.

Certificates of Acknowledgment.—See "Deeds of Married Women," *infra*.

Contracts.—A court of equity will, upon parol evidence, reform a written contract, conveyance, or other instrument, where through fraud or mistake it fails to express the intention of the parties; but to justify such reformation it must be distinctly alleged and conclusively proved that the mistake was mutual, or that it was the mistake of one party superinduced by the fraud or some inequitable conduct of the other: *Smith v. Jordan*, 13 Minn. 264; 97 Am. Dec. 232; *Leitensdorfer v. Delphy*, 15 Mo. 160; 55 Am. Dec. 137; *Coger v. McGee*, 2 Bibb. 321; 5 Am. Dec. 610; *Tesson v. Atlantic Mut. Ins. Co.*, 40 Mo. 33; 93 Am. Dec. 293; *Allison v. Allison*, 144 N. Y. 21; *Keedy v. Nally*, 63 Md. 311; *Benson v. Markoe*, 37 Minn. 30; 5 Am.

St. Rep. 816; *Simpson v. Kane*, 98 Iowa, 271; *Marshall v. Westrope*, 98 Iowa, 324; *Sparta School Tp. v. Mendell*, 138 Ind. 188; *Breja v. Pryne*, 94 Iowa, 755; *Jackson v. Magbee*, 21 Fla. 622; *Thornton v. Krimbell*, 28 Or. 271; *Schwass v. Hershey*, 125 Ill. 653; *Chapman v. Allen, Kirby*, 399; 1 Am. Dec. 24; *Martin v. New York etc. R. R. Co.*, 36 N. J. Eq. 109; *Burns v. Caskey*, 100 Mich. 94; *Bush v. Merriman*, 87 Mich. 260; *Smith v. Watson*, 88 Iowa, 73; *Andrews v. Gillespie*, 47 N. Y. 487; *Park v. Blodgett*, 64 Conn. 28; *Parker v. Schaller Sav. Bank*, 98 Iowa, 246; *Trenton etc. Co. v. Clay Shingle Co.*, 80 Fed. Rep. 46; and the contract may sometimes be reformed though it is in the very language agreed upon: *Smith v. Jordan*, 13 Minn. 264; 97 Am. Dec. 232. These principles apply to a contract to assume a mortgage: *Stephenson v. Elliott*, 53 Kan. 550; to deeds of trust: *Michigan Buggy Co. v. Woodson*, 59 Mo. App. 550, and other deeds. For instance, if an attorney, in drawing a deed by which a father conveys a life estate to his daughter, neglects to insert "for her sole and separate benefit," it constitutes such a mistake as a court of equity will relieve against: *Stone v. Hale*, 17 Ala. 557; 52 Am. Dec. 185.

If a word is accidentally omitted from a contract, but the context clearly and sufficiently indicates the intention of the parties, a court of equity will not reform the instrument: *Atlanta etc. R. R. Co. v. Speer*, 32 Ga. 550; 79 Am. Dec. 305. If a contract is void at law, for want of power to make it, it cannot be reformed in equity and enforced, where there was no fraud, accident, or mistake: *Brazoria County v. Youngstown Bridge Co.*, 80 Fed. Rep. 10, 17. To entitle a party to a decree of a court of equity reforming a written instrument, it must be shown that words were inserted that were agreed to be left out, or that words were omitted that were agreed to be inserted: *Board of Commrs. v. Owens*, 138 Ind. 183, 186. The equity of a party who procures the reformation of a written instrument attaches prior, and is paramount to the lien of a judgment obtained against the party in whom, by reason of such mistake, the legal title vests: *Stone v. Hale*, 17 Ala. 557; 52 Am. Dec. 185.

Either party to a written contract for the sale or exchange of land may have the same specifically enforced in a court of equity, with such corrections in it as parol proof may show to be necessary to correct a mistake made in reducing the contract to writing: *Fishack v. Ball*, 34 W. Va. 644, 649; and if, through fraud or mistake, a written contract to convey does not contain the right description, it may be reformed so as to make it conform to the oral agreement: *Olsen v. Erickson*, 42 Minn. 440. A right to a reformation of a contract is not impaired, if the contract embraces personalty as well as realty, though it is invalid as to the realty: *Thompson v. Marshall*, 36 Ala. 504; 76 Am. Dec. 328. A conveyance of land may be reformed, though the land is held adversely at the time of the conveyance, it being valid inter partes: *Thompson v. Marshall*, 36 Ala. 504; 76 Am. Dec. 328. A court of equity cannot, however, give life to an instrument which has no vitality in itself. Hence, it will not reform a contract for the sale of a homestead, by inserting therein a release of that right and an acknowledgment, for a homestead

must be released or waived in the manner prescribed by law: *Stodalka v. Novotny*, 144 Ill. 125. Neither will a written contract be reformed so as to insert in it a provision which was omitted with the consent of the party asking the reformation, although such consent was given in reliance upon an oral promise of the other party that the omission should not make any difference: *Braun v. Wisconsin Rendering Co.*, 92 Wis. 245.

Deeds may be reformed in equity for fraud or mutual mistake, so as to effect the intention of the parties, and this may be done upon parol evidence, where the proof is clear, convincing and satisfactory. It makes no difference how the mistake originated, or whether the object of the reformation is to correct a misdescription, to include lands omitted by mistake, to enlarge or restrict the character of the estate, to insert or qualify covenants and conditions, or to correct in other respects: *Delscher v. Price*, 148 Ill. 383; *Prater v. Bennett*, 98 Ga. 413; *Rowley v. Flannelly*, 30 N. J. Eq. 612; *Henderson v. Beasley*, 137 Mo. 199; *Layman v. Minneapolis Realty Co.*, 60 Minn. 136; *Gwyer v. Spaulding*, 33 Neb. 573; *Thompson v. Marshall*, 36 Ala. 504; 76 Am. Dec. 328; *Ruffner v. McConnel*, 17 Ill. 212; 63 Am. Dec. 362; *Sawyer v. Hovey*, 3 Allen, 331; 81 Am. Dec. 659; *Somerville v. Trueman*, 4 Har. & McH. 43; 1 Am. Dec. 389; *Stone v. Hale*, 17 Ala. 557; 52 Am. Dec. 185; *Beardsley v. Knight*, 10 Vt. 185; 33 Am. Dec. 193; *Finlayson v. Finlayson*, 17 Or. 347; 11 Am. St. Rep. 836; *Jackson v. Magbee*, 21 Fla. 622; *Berry v. Sowell*, 72 Ala. 14; *Cook v. Preston*, 2 Root 78; *Daniel v. Austin*, 2 Root, 415; *Slater v. Cobb*, 153 Mass. 22; *Warrick v. Smith*, 137 Ill. 504; *Zack v. Krall*, 64 Iowa, 88; *Baldwin v. National Hedge etc. Co.*, 73 Fed. Rep. 574; *Brown v. Cranberry etc. Coal Co.*, 84 Fed. Rep. 930; *Board of Commrs. v. Owens*, 138 Ind. 183; *Savage v. McCorkle*, 17 Or. 42; *Martini v. Christensen*, 60 Minn. 491; *Henderson v. Beasley*, 137 Mo. 199; *Scott v. Queen*, 94 N. C. 462; *Haslett v. Stephany*, 55 N. J. Eq., 68; *Stines v. Hays*, 36 N. J. Eq. 364; *MacVeagh v. Burns*, 2 S. Dak. 83; *Sawyer v. Hanson*, 48 Wis. 611; *Grossbach v. Brown*, 72 Wis. 458; *Ingles v. Merriman*, 96 Wis. 400; *May v. Adams*, 58 Vt. 74; *Green v. Stone*, 54 N. J. Eq. 387; 55 Am. St. Rep. 577.

Thus, an action is maintainable to reform a deed by striking out a clause which, by mistake, reserves to a grantor precisely the same interest he conveyed: *Perry v. Knight*, 85 Me. 184; or the insertion of which is a fraud upon the plaintiff: *Kilmer v. Smith*, 77 N. Y. 226; 33 Am. Rep. 613. A court of chancery may correct a mistake in a defective conveyance, whether it is in regard to a common law or to a statutory requisite, where the mistake is undeniably proved: *Beardsley v. Knight*, 10 Vt. 185; 33 Am. Dec. 193; but a deed cannot be reformed in an action at law: *Winnipiseogee Paper Co. v. Eaton*, 64 N. H. 234. A conveyance will not be reformed in equity without proof that, prior to its execution, there was a mutual agreement for the sale and purchase of a parcel of land different from that described in the deed and that the misdescription was inserted by mistake: *James v. Cutler*, 54 Wis. 172; *Wilson v. Watkins*, 48 S. C. 341.

To justify the reformation of a deed on the ground of mistake, the

rule is that the mistake must be mutual: *Purvines v. Harrison*, 151 Ill. 219; *Wilson v. Wilson*, 23 Nev. 267; *Loud v. Barnes*, 154 Mass. 344; but it has been held that equity will grant relief, by way of reformation, where an attempt to perform an existing contract, as by the execution of a deed, fails through a misunderstanding on the part of the grantor, as to the effect of the instrument by which performance is attempted, although the mistake is not mutual: *Welles v. Yates*, 44 N. Y. 525. So, it has been held that, where a guardian has settled with his two wards, deeded them land, and taken a release, a mistake in the amount of land granted to each ward justifies a reformation of the deed, and that without showing a mutual mistake on the guardian's part, as he is not interested: *Scott v. Queen*, 94 N. C. 462. A deed may be reformed for a clerical error: *First Nat. Bank v. Pearson*, 119 N. C. 494; *West v. Suda*, 69 Conn. 60; and a grantee in a deed is entitled to a reformation of the deeds in his chain of title: *Gwyer v. Spaulding*, 33 Neb. 573; *Tillis v. Smith*, 108 Ala. 264; *Blackburn v. Randolph*, 33 Ark. 119. If a deed contains terms not intended, by mistake, and the part improperly introduced is altered or expunged, the deed stands as reformed: *Green v. State*, 54 N. J. Eq., 387; 55 Am. St. Rep. 577. A conveyance designed to pass a husband's exempt homestead, but which does not correctly describe it, may be reformed, if executed and acknowledged as required by the statute: *Tillis v. Smith*, 108 Ala. 264.

The mistake of a grantor, if known to the grantee, who conceals the truth from the grantor in order to secure a conveyance of land from him which he knows the grantor never intended or agreed to convey, is a case of a mistake of one party, accompanied by fraud or inequitable conduct of the other party, and is a good ground for a reformation of the instrument: *Crookston Imp. Co. v. Marshall*, 57 Minn. 333; 47 Am. St. Rep. 612; *Deischer v. Price*, 148 Ill. 383. So is any active fraud on the part of one of the parties: *Koons v. Blanton*, 129 Ind. 383; *Taber v. Shattuck*, 55 Mich. 370. It is often difficult to say, even upon admitted facts, whether a mistake complained of was occasioned by intentional fraud or by mere inadvertence or mistake, yet as the injury to the complainant would be the same in either case, it is the facts, as found, that give the right to relief in equitable remedies given for fraud, accident or mistake: *Wasatch Min. Co. v. Crescent Min. Co.*, 148 U. S. 293, 298.

Mutual mistake occurs generally in the description of the property conveyed, and the cases are numerous where, upon satisfactory proof by parol evidence, the reformation of a deed for misdescription has been allowed. To ascertain whether a mistake has been made in describing property in a deed, it is essential, of course, to know the intent of the parties, the one in selling, and the other in buying, respecting the subject matter of the conveyance; and if the deed fails to express their intention, there is a mutual mistake, relievable in equity, by way of reformation, where the proof is clear, convincing and satisfactory: *Conlin v. Masecar*, 80 Mich. 139; *Crookston Imp. Co. v. Marshall*, 57 Minn. 333; 47 Am. St. Rep. 612; *Kranshaar v. Hank*, 27 Or. 92; *Styers v. Robbins*, 76 Ind. 547; *Morrison v. Collier*, 79 Ind. 417; *Jones v. Johnston*, 18 How. 150; *Deford v. Mercer*, 24

Iowa, 118; 92 Am. Dec. 460; *Iestrade v. Barth*, 19 Cal. 660, 672; *Thompson v. Ladd*, 109 Ill. 73; *Henderson v. McKernan*, 151 Ill. 273; *Connor v. Armstrong*, 86 Ala. 262; *Purvines v. Harrison*, 151 Ill. 219; *Eva v. McMahon*, 77 Cal. 467; *Rich v. Trustees*, 158 Ill. 242; *Lucas v. Labertue*, 88 Ind. 277; *Parish v. Camplin*, 139 Ind. 1; *Judson v. Miller*, 106 Mich. 140. A mistake in the description of property, in a deed executed by a married woman, may be corrected; *Styers v. Robbins*, 76 Ind. 547; *Parish v. Camplin*, 139 Ind. 1; and a mistake of description in a deed may be corrected, although the false description might be rejected as surplusage and still leave a sufficient description: *Rich v. Trustees*, 158 Ill. 242. A grantor in a deed may have a mutual mistake in the description corrected, in a suit to quiet title, against the devisee of the grantee, to a portion of the land not intended to be conveyed, without averring, in his complaint, a demand for a correction of the mistake: *Lucas v. Labertue*, 88 Ind. 277. Though the terms of a deed are stated according to the intent of both parties, yet if they use the description they do because of their mistake in respect to the land to which that description applies, this is a mistake of fact justifying a reformation of the deed: *Crookston Imp. Co. v. Marshall*, 57 Minn. 333; 47 Am. St. Rep. 612. If error exists in a plat to which reference is made in deeds, the deeds should be reformed: *Jones v. Johnston*, 18 How. 150. A misdescription in a conveyance founded on a consideration may be reformed, though the deed is a quitclaim, and contains no covenants: *Deford v. Mercer*, 24 Iowa, 118; 92 Am. Dec. 460. If the evidence shows clearly and satisfactorily that a misdescription exists in a deed, it should be reformed whether it was inserted through fraud or mistake: *James v. Cutler*, 54 Wis. 172; *Sullivan v. Moorhead*, 99 Cal. 157; *Summers v. Coleman*, 80 Mo. 488; or by agreement of the parties; *Eva v. McMahon*, 77 Cal. 467. As between the immediate parties to a deed, a description will be corrected, though the mistake arose from negligence, for the rule that equity will not aid the negligent does not apply in its fullest sense to the correction of mistakes merely in the description of property granted: *Morrison v. Collier*, 79 Ind. 417. If the mistake in a deed does not depend upon the legal meaning of the words used, but upon the application of the description in the deed to the land, which involves a mere question of fact, a court of equity will restrict the operation of the deed to what was actually understood and intended by the parties, either by ordering the deed to be reformed, or by restraining the grantee from availing himself of it beyond the mutual understanding and intention: *Wilcox v. Lucas*, 121 Mass. 21, 25; *West v. Mahaney*, 86 Mich. 121; Compare *Crookston Imp. Co. v. Marshall*, 57 Minn. 333; 47 Am. St. Rep. 612. If a mistake of description occurs, in a series of conveyances, under circumstances that would entitle any one of the vendees to a reformation as against his immediate vendor, the equity will work back through all, and give the last vendee a right of reformation against the original vendor: *Blackburn v. Randolph*, 33 Ark. 119; *Tillis v. Smith*, 108 Ala. 264, 267; *Gwyer v. Spaulding*, 33 Neb. 573. A grantee is entitled to a reformation of the description of land contained in a deed, even if he and his grantors had no contract rela-

tions, and they in fact thought they were conveying to another, when it appears that the same land, misdescribed as in the deed, had been mortgaged to a third party by the grantors, and that the mortgagee had contracted to take the land in satisfaction of his mortgage, and that, at his instance, the deed was made to the grantee: *Elwood v. Stewart*, 5 Wash. 736.

If property has been included, by mistake, in a deed which the parties never intended should be conveyed, which the grantor was under no legal or moral obligation to convey, and which the grantee in good conscience has no right to retain, the deed may, upon satisfactory proof by parol evidence, be reformed to accord with the intention of the parties: *Burrton Land etc. Co. v. Handy*, 54 Kan. 13; *Gillespie v. Moon*, 2 John Ch. 585; 7 Am. Dec. 559; *Sepulveda v. Sepulveda*, 77 Cal. 605; *Dulo v. Miller*, 112 Ala. 687; *Goode v. Riley*, 153 Mass. 585; *Crookston Imp. Co. v. Marshall*, 57 Minn. 333; 47 Am. St. Rep. 612; and the fact that the defendant did or did not know, at the time the deed was delivered to him, that it contained a greater estate than that bargained for, is immaterial: *Dulo v. Miller*, 112 Ala. 687. Thus, where a trustee for an infant, intending to convey two hundred acres, part of an entire tract containing two hundred and fifty acres, by a mistake in the description, conveyed the whole tract, the court, in a suit brought by the cestui que trust after the death of the trustee, and upon parol proof of the mistake, decreed a reconveyance of the fifty acres erroneously included in the deed: *Gillespie v. Moon*, 2 John. Ch. 585; 7 Am. Dec. 559, a leading American case on the subject. If too much is granted, by misdescription, equity will reform the deed whether the misdescription was the result of mutual mistake or of intentional misstatement on the part of the grantor: *Ezell v. Peyton*, 134 Mo. 484.

On the other hand, a deed may be reformed to include land omitted by mutual mistake of the parties; in other words, to include more land than is described therein, in accordance with the intention of the parties: *Sullivan v. Moorhead*, 99 Cal. 157; *Paine v. Upton*, 87 N. Y. 327; 41 Am. Rep 371; *Brown v. Cranberry etc. Coal Co.*, 82 Fed. Rep. 351; *Wasatch Min. Co. v. Crescent Min. Co.*, 148 U. S. 293; *Rowley v. Flannelly*, 30 N. J. Eq. 612; *Metropolitan Lumber Co. v. Lake Superior etc. Iron Co.*, 101 Mich. 577; *Ezell v. Peyton*, 134 Mo. 484; *Harding v. Wright*, 138 Mo. 11; *Henderson v. Beasley*, 137 Mo. 199; *Cordes v. Coates*, 78 Wis. 641; *Elwood v. Stewart*, 5 Wash. 736; *Whitmore v. Hay*, 85 Wis. 240; 39 Am. St. Rep. 838; *Fuller v. Providence etc. Bank*, 14 R. I. 363; *Moore v. Hazelwood*, 67 Tex. 624.

If the parties contract with reference to one tract of land, but another tract is described in the deed, the instrument may be reformed to comply with their intention: *Felton v. Leigh*, 48 Ark. 498; *Comstock v. Coon*, 135 Ind. 640; *Johnson v. Johnson*, 8 Baxt. 261. If a deed by mistake describes land not owned by the grantor, instead of that which he intended to convey, and a subsequent grantee of the latter land takes his deed with knowledge of that fact, the first deed may be reformed to effect the intention of the parties: *Hoyt v. Gooding*, 99 Mich. 71. Equity will correct a mistake in a title bond in the description of the land conveyed by which a differ-

ent tract from the one really sold is described in the bond, where the evidence is too clear to admit of any doubt: *Mosby v. Wall*, 23 Miss. 81; 55 Am. Dec. 71.

A deed absolute in form, if given to secure the payment of a debt, may be treated in equity as a mortgage; but it must be shown, either by direct evidence, or by the circumstances of the case, that it was the mutual intention of the parties for it to so operate. It is not enough that one of the parties so considered it; both must concur. Otherwise, the deed will be treated according to its import, unless it is tainted by fraud, or is the result of mutual mistake or accident: *Ahern v. McCarthy*, 107 Cal. 382; *Reeder v. Gorsuch*, 55 Kan. 553, 557; *Moffett v. Hanner*, 154 Ill. 649; *Ellis v. Hunnicutt*, 71 Ga. 637; *Barnett v. People's Bank*, 65 Ga. 51. A deed absolute upon its face may be shown by parol evidence to have been intended to operate merely as a mortgage; but such parol evidence must be clear, convincing and satisfactory: Notes to *Mannix v. Purcell*, 15 Am. St. Rep. 584; *Wallace v. Smith*, 85 Am. St. Rep. 872.

A deed will not be reformed in the absence of mutual mistake or of fraud or inequitable conduct on one side and mistake on the other: *Hollenback's Appeal*, 121 Pa. St. 322; *Berry v. Webb*, 77 Ala. 507; *Ruffner v. McConnel*, 17 Ill. 212; 63 Am. Dec. 362; *Leonard v. Wills*, 24 Kan. 231; *Bancharel v. Patterson*, 64 Minn. 454; *British etc. Mortgage Co. v. Long*, 113 N. C. 123; *Bowman v. Bittenbender*, 4 Watts, 290; *Fischer v. Laack*, 85 Wis. 280; *Brown v. Balen*, 33 N. J. Eq. 469; *Burnell v. Morris*, 106 Ala. 349; *Kilpatrick v. Strozier*, 67 Ga. 247; *Loud v. Barnes*, 154 Mass. 344. A deed cannot be corrected without a showing that the complainant holds under it: *Ballentine v. Clark*, 38 Mich. 395; and it cannot be reformed on the ground of mistake where it does not appear that the mistake was a mutual one: *Adkins v. Tomlinson*, 121 Mo. 487. The mere fact that a deed and a contract do not agree does not justify a reformation of the deed. It must be proved that the discrepancy arose through fraud or mistake: *Whitney v. Smith*, 33 Minn. 124. Equity will not reform deeds on the ground of mistake, if the mistake is not material to the rights of the parties: *Daggett v. Ayer*, 65 N. H. 82; or where they were drawn precisely as the parties intended: *Dunham v. New Britain*, 55 Conn. 378. Equity will not reform a deed by inserting a condition subsequent, and declaring a forfeiture for a breach of such condition: *Mills v. Evansville Seminary*, 47 Wis. 354. The reformation of a deed will be denied, if the intention of the parties to the contract, to convey a particular piece of land other than the one described in the deed, is not clearly shown: *Seward v. Spurgeon*, 9 Wash. 74. If a grantee in a deed assumes to pay a specific mortgage, it cannot be so reformed as to provide for the assumption of a second mortgage, the existence of which was unknown to the grantee and forgotten by the grantor at the time the deed was made: *Moore v. Graves*, 97 Iowa, 4. If, by mutual mistake, a deed conveys too much land, it cannot be corrected at the suit of the vendor, when, after the discovery of the mistake he receives the purchase money and yields possession to the vendee: *Wittbecker v. Walters*, 69 Tex. 470.

Deeds of Married Women.—It is laid down broadly, in many cases,

that a court of equity has no power to reform the deed of a married woman: *Bowden v. Bland*, 53 Ark. 53; 22 Am. St. Rep. 179; *Leonis v. Lazzarovich*, 55 Cal. 52; *Holland v. Moore*, 39 Ark. 120; *Moulton v. Hurd*, 20 Ill. 137; 71 Am. Dec. 257, and note; *Martini v. Hargardine*, 46 Ill. 322; but this statement, not qualified, is unsound law as a general proposition. This rule doubtless exists, to a limited extent, in jurisdictions where a wife is under a legal disability to contract, or where her deed, to be effectual, must be executed and acknowledged in the manner prescribed by statute. If her deed is void because of an omission of some statutory requirement, essential to its validity, the mistake cannot, of course, be reformed in a court of equity, for it has no more jurisdiction than a court of law to give effect to instruments inoperative for want of compliance with a condition made by statute prerequisite to their validity: *Gebb v. Rose*, 40 Md. 387; *Townsley v. Chapin*, 12 Allen, 476; *Grapengether v. Fejer-vary*, 9 Iowa, 163; 74 Am. Dec. 336; *Dickinson v. Glenney*, 27 Conn. 104; *Connor v. Armstrong*, 86 Ala. 262; *Shroyer v. Nickell*, 55 Mo. 264; *Cannon v. Beatty*, 19 R. I. 524; *Williams v. Cudd*, 26 S. O. 213; 4 Am. St. Rep. 714; *Hamar v. Medsker*, 60 Ind. 413. Thus, a certificate of acknowledgment is essential to the validity of a married woman's deed: *Leonis v. Lazzarovich*, 55 Cal. 52; and a court of equity has no power to compel her to correct an insufficient acknowledgment, for which she and her husband have received the consideration, as her consent must be perfectly free: *Barrett v. Tewksbury*, 9 Cal. 13. The statute relating to the acknowledgment of deeds and mortgages by a married woman must be strictly complied with, and this must appear in the certificate of the officer taking the acknowledgment. Hence, a certificate which fails to show that the instrument was read, or otherwise made known to her, has been held fatally defective: *Spencer v. Reese*, 165 Pa. St. 158. So an officer's certificate of a wife's acknowledgment to a conveyance of the homestead by husband and wife is substantially defective in omitting to certify her examination and acknowledgment in the mode required by the statute. In such a case, a court of equity has refused to reform the conveyance on the ground that the examination and acknowledgment were in fact properly made, but not shown by the certificate from ignorance or mistake on the part of the officer. An officer's certificate of acknowledgment, in substantial compliance with the statutory form, is, it is said, as essential to a valid alienation of the homestead as the examination and acknowledgment of the wife required by the statute, and a substantial compliance must affirmatively appear from the certificate itself, which is the sole and exclusive evidence of the voluntary signature and assent of the wife. Therefore, the admission of parol evidence to supply deficiencies in such a case has been denied: *Cox v. Holcomb*, 87 Ala. 589; 13 Am. St. Rep. 79. On the other hand, if an acknowledgment by a married woman has been made according to law, before an officer qualified by law to take it, she has done all that the law requires to make the instrument effective as her own. Hence, it has been held that a conveyance, thus executed and acknowledged by a married woman, though defectively certified, has the same legal effect as the deed of a feme

sole: *Wedel v. Herman*, 59 Cal. 507; and that a defective certificate of acknowledgment of a deed, mortgage, or other instrument made by a married woman may be reformed, so as to make it state the truth: *Bunnell v. Eno Inv. Co.*, Idaho, Dec., 1897; *Hutchinson v. Ainsworth*, 63 Cal. 286; though the certificate cannot, even under an allegation of mistake, be contradicted by showing that the instrument was not voluntarily acknowledged by the wife, or that her husband was present: *Tichenor v. Yankey*, 89 Ky. 508.

But, conceding that equity will not reform a defective deed of a married woman, where the defect arises from the omission of some statutory requisite, or that it will not interfere where there has been a non-execution of statutory powers: *Williams v. Cudd*, 26 S. C. 213; there is no good reason why equity should not step in and, for a mutual mistake, reform a married woman's deed, which has been properly executed and acknowledged, and the acknowledgment certified as required by law. Equity will, therefore, reform a deed, mortgage, or other instrument, executed by a married woman with the required formalities, where the correction sought is in the description of the property affected, and which has been misdescribed by mutual mistake. In other words, it will reform a married woman's deed or mortgage for misdescription, notwithstanding her opposition, and though her husband is joined with her in the conveyance: *Gardner v. Moore*, 75 Ala. 394; 51 Am. Dec. 454, and extended note thereto; *Parker v. Parker*, 88 Ala. 362; 16 Am. St. Rep. 52; *Parker v. Parker*, 88 Ala. 365; *Christensen v. Hollingsworth*, Idaho, May, 1898; *Murdoch v. Leonard*, 15 Wash. 142; *Bradshaw v. Atkins*, 110 Ill. 323; *Carper v. Munger*, 62 Ind. 481; *Styers v. Robbins*, 76 Ind. 547; *Parish v. Camp- lin*, 139 Ind. 1. A mistake in the description of the lands intended to be conveyed may be corrected either against her, or, on her decease, against her heirs: *Hamar v. Medsker*, 60 Ind. 413. The same principle applies to a deed of marriage settlement executed by a woman: *Moore v. Quince*, 109 N. C. 85. A married woman may, in Illinois, at the present time, be compelled to correct a mistake which has occurred in the execution of a deed; and such deed, if duly executed, may be reformed in equity by correcting a mistake in the description of property therein, so as to make such deed express what the parties intended it should: *Snell v. Snell*, 123 Ill. 403; 5 Am. St. Rep. 526. If a married woman properly executes and acknowledges a mortgage, it may be reformed, if it contains clerical mistakes in the description of the mortgaged premises, when such mistakes are confessed by the mortgagor: *Savings etc. Society v. Meeks*, 66 Cal. 371; or, if, by mistake, a tract of land not owned by her is described therein instead of the land intended to be mortgaged. In the latter case, the mistake may be corrected and the mortgage enforced as to the land intended to be embraced: *Tichenor v. Yankey*, 89 Ky. 508. In Montana, the power of a court of equity to reform a deed or mortgage of a married woman on account of a defective description of land is denied where the statute is silent upon the subject: *Montana Nat. Bank v. Schmidt*, 6 Mont. 609. On the other hand, a married woman has a right to enforce the reformation of a deed or mortgage to herself, which is, by mistake, defective by rea-

son of misdescription: *Stevens v. Holman*, 112 Cal. 845; 53 Am. St. Rep. 216; *Courtright v. Courtright*, 63 Iowa, 356. Compare monographic note to *Tiernan v. Poor*, 19 Am. Dec. 230-236, on the power of equity to perfect or enforce defectively executed or acknowledged instruments of a married woman.

Deeds of Gift, which do not express the intention of the grantor, may be reformed: *Larkins v. Biddie*, 21 Ala. 252; but equity will not so reform such a deed as to give it an effect contrary to the intention of the grantor: *Meeks v. Stillwell*, 54 Ohio St. 541.

Deeds of Sheriffs—Judicial Sales.—It has been held that a sheriff's deed may be reformed to accord with the facts, where admissible evidence shows that its recitals are wrong and should be corrected: *Bartlett v. Judd*, 21 N. Y. 200; 78 Am. Dec. 131; *Thomas v. Dockins*, 75 Ga. 847; *Wise v. Brooks*, 69 Miss. 891, 895; and that, if there has been a mistake as to the quantity of land sold at a judicial sale, a court of equity may afford relief, if the mistake was such that relief would be granted had the sale been a private one: *Miller v. Craig*, 83 Ky. 623; 4 Am. St. Rep. 179. In *Grayson v. Weddle*, 80 Mo. 39, the land was not correctly described in an administrator's deed, and it was held that an assignee of the purchaser, the latter having paid the purchase money, which was applied in discharge of the debts of the decedent, was entitled to a decree in equity correcting the error and divesting the legal title to the land out of the heirs of the decedent and vesting it in him. So, where a tract of land not in fact sold, and for which no consideration was paid or intended to be paid, was, by mistake, included in the report of sales, it was held, in *Stites v. Wiedner*, 35 Ohio St. 555, that the mistake could be corrected, in equity, as against the purchaser, or his heirs, even after a confirmation of the sale, and a deed in pursuance thereof. The weight of authority, however, seems to be that an action to reform a sheriff's deed which has been improperly or defectively executed, cannot be maintained: See extended note to *Bartlett v. Judd*, 78 Am. Dec. 136, 137, on reforming sheriff's deed, showing that the grantee in such cases is not without remedy, but is entitled to have another deed, valid in form, and which shall conform to the facts of the case: Compare *Conner v. Wells*, 91 Ind. 197.

Deed for Taxes.—If property is sold for taxes, and, by mistake of the county auditor, the purchaser's deed erroneously describes the land, it cannot be reformed by suit: *Keeper v. Force*, 86 Ind. 81.

Insurance Policies.—If, through fraud or mutual mistake, a policy of insurance does not contain the contract entered into between the insurer and the insured, equity has jurisdiction, at the suit of either party, to reform it, by parol testimony, to accord with the intention of the parties and will do so upon clear, convincing, and satisfactory proof of such fraud or mistake. The mistake must be mutual, or there must be mistake of one party to the contract accompanied by fraud on the other's part to justify reformation: *Slobodisky v. Phoenix Ins. Co.*, 52 Neb. 395; *Bryce v. Lorillard Fire Ins. Co.*, 55 N. Y. 240; 14 Am. Rep. 249; *Western etc. Co. v. Ward*, 75 Fed. Rep. 338; *New York Life Ins. Co. v. McMaster*, 87 Fed. Rep. 63; *Commonwealth etc. Ins. Co. v. Huntzinger*, 98 Pa. St. 41, 47; *Tesson v. Atlantic Mut.*

Ins. Co., 40 Mo. 83; 93 Am. Dec. 293; *Parsons v. Hosmer*, 2 Root 1; 1 Am. Dec. 58; *Phoenix Fire Ins. Co. v. Gurnee*, 1 Paige, 278; 19 Am. Dec. 431; *Lippincott v. Insurance Co.*, 3 La. 546; 23 Am. Dec. 467; *Harris v. Columbiana etc. Ins. Co.*, 18 Ohio, 116; 51 Am. Dec. 448; *National Fire Ins. Co. v. Crane*, 16 Md. 260; 77 Am. Dec. 289; *Stout v. City Fire Ins. Co.*, 12 Iowa, 371; 79 Am. Dec. 539; *Bailey v. American Cent. Ins. Co.*, 4 McCrary, 221; *Oliver v. Mutual etc. Ins. Co.*, 2 Curtis, 277; *Fink v. Queen Ins. Co.*, 24 Fed. Rep. 318; *Andrews v. Essex Fire Ins. Co.*, 3 Mason, 6, 10; *German Fire Ins. Co. v. Gueck*, 130 Ill. 345; 81 Ill. App. 151; *Abraham v. North German Ins. Co.*, 40 Fed. Rep. 717; *Thomason v. Capital Ins. Co.*, 92 Iowa, 72; *Fitchner v. Fidelity etc. Assn.*, 103 Iowa, 276; *Balen v. Hanover Fire Ins. Co.*, 67 Mich 179; *Spurr v. Home Ins. Co.*, 40 Minn. 424. It makes no difference whether the mistake is in the description of the property insured, in the name of the insured, or in some clause or covenant of the policy. A majority of the cases concern fire insurance, but equity will give relief in case of a mistake in drawing a life policy: *Parsons v. Hosmer*, 2 Root, 1; 1 Am. Dec. 58; or a marine policy: *Andrews v. Essex etc. Ins. Co.*, 3 Mason, 6. If it appears that the secretary of a mutual relief association and the assured, both understood at the time of application for insurance that a certain person's name should be entered on the record as beneficiary, without further direction, the certificate of membership may be reformed after the death of the member by inserting the name of such beneficiary: *Scott v. Provident etc. Assn.*, 63 N. H. 556. A fire policy may be reformed, even after a loss, to express the intention of the parties: *Continental Ins. Co. v. Ruckman*, 127 Ill. 364; 11 Am. St. Rep. 121; *Esch v. Home Ins. Co.*, 78 Iowa, 334; 16 Am. St. Rep. 443; *Keith v. Globe Ins. Co.*, 52 Ill. 518; 4 Am. Rep. 624; *Ben Franklin Ins. Co. v. Gillett*, 54 Md. 212; *Snell v. Insurance Co.*, 98 U. S. 85; *Brugger v. State Investment Co.*, 5 Saw. 304; and so with a marine policy: *Hill v. Millville Ins. Co.*, 39 N. J. Eq. 66.

Equity will interpose not only in cases of fraud, but also of mistake, where an insurance policy is drawn up in a form different from the application, or anything is omitted which it is the duty of the company to insert or indorse on the instrument: *National Fire Ins. Co. v. Crane*, 16 Md. 260; 77 Am. Dec. 289. An application for a policy of insurance may be reformed, so as to make it conform to the representation of facts made to the insurer's agent, if the insured was misled into signing an application containing a wrong statement by the action of such agent: *Harris v. Columbiana etc. Ins. Co.*, 18 Ohio, 116; 51 Am. Dec. 448. The existence of fraud and mistake is a matter of proof. It is an inference to be drawn from the proof of obvious facts and circumstances from which the principal fact in controversy may be inferred. The insertion of a clause, foreign to the contract, in a policy of insurance, if purposely done, gives room for an inference of fraud, but, though it was inserted by mistake, and that fact not discovered until just before the loss, the insured would still be entitled to have the instrument reformed so as to express the real contract: *Clem v. German Ins. Co.*, 29 Mo. App. 666. If an answer by the insured is written by an agent of the company as made, there is no mutual mistake, and, of course, no relief for

him who warranted the answer to be true, unless the agent deceived him into the making of it; but if the agent, intending to write an answer to his question as made by the applicant, writes something else, and the paper is signed, both believing the answer correctly written, there is a mutual mistake, and the policy may be reformed: *Commonwealth etc. Ins. Co. v. Huntzinger*, 98 Pa. St. 41, 47. If the agent, by a mistake of law, adopts the wrong form of policy to protect the interests of the insured, who has correctly stated his interests in the property, and distinctly asked for insurance thereon, the policy may, after loss, be reformed in equity so as to express the intention of the parties: *Esch v. Home Ins. Co.*, 78 Iowa, 384; 16 Am. St. Rep. 443. The insured has a right to rely on the agent's writing the policy in accordance with the contract, and it has been held that, even if he fails to read the policy, and discover the omission therein, he is not guilty of such negligence as will bar him of the right to have a policy reformed by inserting an omitted provision therein: *Barnes v. Hekla Fire Ins. Co.*, 75 Iowa, 11; 9 Am. St. Rep. 450; *Germania Life Ins. Co. v. Lunkenheimer*, 127 Ind. 536; that if an applicant for insurance relies upon an insurance agent to write down his answers, and he signs the application after the agent has done so, without reading it, he is not negligent, though the answers are wrong; that it is immaterial whether the agent acted dishonestly or mistakenly; and that it is not necessary to reform such an application in order to secure a recovery on the policy: *Germania Life Ins. Co. v. Lunkenheimer*, 127 Ind. 536. But there is strong authority to the effect that it is the duty of the insured to read and know the contents of his policy before accepting it; and that if one can read his policy, his failure to do so is such gross negligence as conclusively estops him from denying knowledge of its contents, unless he was dissuaded from reading it by some trick, artifice or fraud of the other party to the agreement: *New York Life Ins. Co. v. McMaster*, 87 Fed. Rep. 63, 67, reversing *McMaster v. New York Life Ins. Co.*, 78 Fed. Rep. 38; and see *McCormick v. Orient Ins. Co.*, 86 Cal. 260. A suit may be maintained, after a loss, to reform a policy so as to conform it to the agreement made with the insured before its issuance, and a recovery may be had in the same suit upon the policy as thus reformed: *Continental Ins. Co. v. Ruckman*, 127 Ill. 364; 11 Am. St. Rep. 121. The existence of a remedy at law cannot defeat the reformation of a contract of insurance, unless it is adequate and as efficacious as the remedy in equity: *Western etc. Co. v. Ward*, 75 Fed. Rep. 338. If, by accident, mistake, or design, a policy is made payable to a person by a wrong name, he may sue in his true name, without a reformation of the contract, by averring that the policy was made to him in the name therein appearing: *Lumbermen's Mut. Ins. Co. v. Bell*, 166 Ill. 400; 57 Am. St. Rep. 140. The slip or application for insurance is admissible, in equity, to correct the policy: *Dow v. Whetten*, 8 Wend. 160. The indorsements thereon, showing its acceptance by the company, are admissible: *Lippincott v. Insurance Co.*, 3 La. Ann. 546; 23 Am. Dec. 467.

But while an insurance policy, like any other written contract, may be impeached by either party thereto for fraud or mistake,

equity will refuse to reform the contract if the evidence is insufficient to establish fraud on one side and mistake on the other, or mutual mistake. It must be shown that the agreement states less or more than was intended by the parties, or that there was some fraud or imposition whereby an unconscionable advantage was or may be had by one party over the other. Otherwise there can be no reformation: *Avery v. Equitable Life etc. Soc.*, 117 N. Y. 451; *Home Fire Ins. Co. v. Wood*, 50 Neb. 381; *St. Paul etc. Ins. Co. v. Shaver*, 76 Iowa. 282; *McCormick v. Orient Ins. Co.*, 86 Cal. 260; *Bowers v. New York Life Ins. Co.*, 68 Fed. Rep. 785; *Mitchell v. Capital etc. Ins. Co.*, 110 Ala. 583; *Farmville Ins. etc. Co. v. Butler*, 55 Md. 233; *Spare v. Home Mut. Ins. Co.*, 19 Fed. Rep. 14; *Hearne v. Marine Ins. Co.*, 20 Wall. 488, 491; *Travelers' Ins. Co. v. Henderson*, 69 Fed. Rep. 762, involving an accident policy. A policy of insurance cannot, it seems, be reformed by parol evidence of mistake, to the extent of altering a warranty. Nor can it be reformed for mistake of the insured alone; and evidence that the agent of the company, who filled out the application, the representations of which were made a warranty, was also mistaken, does not show a mutual mistake for which the policy will be reformed: *Cooper v. Farmers' etc. Ins. Co.*, 50 Pa. St. 299; 88 Am. Dec. 544. Compare *Germania Life Ins. Co. v. Lunkenheimer*, 127 Ind. 536. It has been held that a misdescription of the land on which insured houses stand will not defeat a recovery in case of loss by fire, because the court looks at the real contract of the parties, which was to insure certain property of the policyholder; and that it is not necessary to reform the policy to entitle the insured to recover: *Phenix Ins. Co. v. Gebhart*, 32 Neb. 144; but it is held in *Collins v. St. Paul etc. Ins. Co.*, 44 Minn. 440, that if the parties intended insurance to be on buildings upon section 32, but the policy insured buildings on section 31, no recovery could be had for a loss to buildings on section 32, without a reformation of the policy. So, there can be no recovery on an accident policy, dated at a certain time, time for an injury accruing prior to that time, until the policy is reformed: *Fowler v. Preferred Accident Ins. Co.*, 100 Ga. 330, 333.

Mortgages.—A court of equity will, upon parol testimony, reform a mortgage or deed of trust to secure a debt, which fails to express the intention of the parties, on account of mutual mistake, or mistake on one side accompanied by fraud on the other, where the evidence of it is clear, convincing, and satisfactory: *Rainey v. Allison*, 64 Tex. 607; *De Peyster v. Hasbrouck*, 11 N. Y. 582; *Andrews v. Gillespie*, 47 N. Y. 487; *Ramsey v. Smith*, 32 N. J. Eq. 28; *Straman v. Rechtime*, 58 Ohio St. 443; *Merrifield v. Ingersoll*, 61 Mich. 4; *Morisey v. Swinson*, 104 N. C. 555; 106 N. C. 221; *Michigan Buggy Co. v. Woodson*, 59 Mo. App. 550; *Citizens' Nat. Bank v. Judy*, 146 Ind. 322; *Wilson v. Stewart*, 63 Ind. 294; *Savings etc. Soc. v. Meeks*, 66 Cal. 371; *Allen v. Elder*, 76 Ga. 674; 2 Am. St. Rep. 63; *Strang v. Beach*, 11 Ohio St. 283; 78 Am. Dec. 308; *Denver etc. Mfg. Co. v. McAllister*, 6 Colo. 261. It makes no difference whether the mistake is in a matter of description, a name, or some other particular. A misdescription of the mortgaged property may be reformed: *Giselman v. Starr*, 106 Cal. 651; *Strang v. Beach*, 11 Ohio St. 283; 78 Am.

Dec. 108; *Carpenter Paper Co. v. Wilcox*, 50 Neb. 659; *Peck v. Osteen*, 87 Fla. 427. A mortgage given on one lot may be reformed to cover another: *Way v. Roth*, 159 Ill. 162; *Sowler v. Day*, 58 Iowa, 252. In other words, it may be reformed to cover the land intended, whether more or less: *Utterson Lumber Co. v. Rennie*, 21 Can. Sup. Ct. 218; *Tichenor v. Yankey*, 89 Ky. 508; *Way v. Roth*, 159 Ill. 162. It may be reformed to correctly describe the date of maturity of the note secured by it: *Commercial Nat. Bank v. Johnson*, 16 Wash. 536. A homestead mortgage executed by a husband and wife in conformity with the Alabama statute may be reformed in equity for mistake in describing one of the subdivisions of land, if the quantity of land conveyed is not thereby increased: *Witherington v. Mason*, 86 Ala. 345; 11 Am. St. Rep. 41; and, if a husband and wife agree to mortgage their homestead, and execute a mortgage which they know does not include the whole thereof, but which they know is accepted by the mortgagee in the belief that it includes all such homestead, the mortgage may be reformed in equity so as to include all the land which was agreed to be mortgaged: *Stevens v. Holman*, 112 Cal. 345; 53 Am. St. Rep. 216. A mortgage which describes the land intended to be mortgaged by metes and bounds may be reformed, if it appears that it was the intention of the parties to mortgage a tract upon which certain buildings stood, and that, by mutual mistake, the land was so described as to indicate only a portion of the buildings: *Jenkins v. Jenkins University*, 17 Wash. 160, 173. A mortgage which was intended to convey a fee but which, through ignorance or mistake, covers only a life estate, may be reformed in equity: *Lardner v. Williams*, 98 Wis. 514.

A mortgage or deed of trust to secure a debt may be so reformed as to correct a mistake in the name of the mortgagor or mortgagee, or in omitting either name: *Collins v. Cornwell*, 131 Ind. 20; *Parlin v. Stone*, 1 McCrary, 443; *Hitesman v. Donnel*, 40 Ohio St. 287; *Martin v. Nixon*, 92 Mo. 26.

A mistake in a mortgage may sometimes be corrected after a decree of foreclosure or sale, where the rights of third parties have not intervened: *First Nat. Bank v. Wentworth*, 28 Kan. 183; *Conyers v. Mericles*, 75 Ind. 443; *Jones v. Sweet*, 77 Ind. 187, to include property intended to be included therein, but which was inadvertently omitted: *Phillips v. Roquemore*, 96 Ga. 719. Thus, if the description of the mortgaged premises is, by mutual mistake, so defective that no title will pass under a sale, or if, in consequence of such mistake, land is described which does not belong to the mortgagor, instead of land which does, there may be a reformation of the mortgage, even after sale: *Ray v. Ferrell*, 127 Ind. 570. In *First Nat. Bank v. Wentworth*, 28 Kan. 183, 188, it is held that the duty of a court of equity to correct a mistake in a mortgage is coextensive with the mistake, and extends, not merely to the reformation of the original instrument, but also to all subsequent proceedings, papers, judgments, and decrees into which the mistake, as a mistake is carried; but in *Conyers v. Mericles*, 75 Ind. 443, it is held that, if an incorrect description of lands intended to be mortgaged is carried into the judgment, order of sale, notice, and sheriff's deed, such pro-

ceedings cannot be corrected, either at the instance of the mortgagee or the purchaser at the sale; but such mistake may be corrected by reforming the mortgage and foreclosing it as reformed: *Conyers v. Mericles*, 75 Ind. 443, 448.

In an action to correct and foreclose a mortgage, it is not necessary to correct a description before foreclosing, where the premises embraced in the mortgage will be the same after the correction as before it: *Schmitz v. Schmitz*, 19 Wis. 207; 88 Am. Dec. 681. A mortgage released by mistake may be foreclosed: *Bond v. Dorsey*, 65 Md. 310. A mortgage on land, which contains a description so defective and uncertain that it cannot be reformed, cannot be foreclosed: *Merchants' etc. Assn. v. Scanlan*, 144 Ind. 11. So a mortgagee of a mortgage which is shown to be tainted with usury cannot maintain a bill to reform it unless he offers to abate the whole interest: *Hawkins v. Pearson*, 96 Ala. 369.

A mortgage cannot, of course, be reformed for mutual mistake, or mistake on one side and fraud on the other, unless there is clear, satisfactory, and convincing evidence of the mistake or fraud: *Keys v. Lardner*, 55 Kan. 331; *Citizens' Nat. Bank v. Judy*, 146 Ind. 322; *Merchants' etc. Assn. v. Scanlan*, 144 Ind. 11; *Whipperman v. Dunn*, 124 Ind. 349; *Ray v. Ferrell*, 127 Ind. 570; *Dunham v. Packing Co.*, 100 Mich. 75; *First Nat. Bank v. Gough*, 61 Ind. 147; *Petesich v. Hambach*, 48 Wis. 443; *Cranston Print Works v. Dyer*, 19 R. I. 208; *Wright v. Garrison*, 40 Mich. 50; *Eslava v. Lepretre*, 21 Ala. 504; 56 Am. Dec. 266; *Ames v. New Jersey etc. Co.*, 12 N. J. Eq. 66; 72 Am. Dec. 385; *Price v. Cutts*, 29 Ga. 142; 74 Am. Dec. 52. A mortgage will not be reformed so as to include the homestead of the mortgagors, though such homestead was intended to be embraced in it, if the statute of the state declares that no mortgage of a homestead by a married man shall be valid or of any effect without the signature of his wife to the same, and the wife did not sign the instrument, though before suit was brought the husband had died, and the widow, by her answer, assented to such reformation, as her consent to such reformation is not equivalent to her signing the mortgage: *O'Malley v. Ruddy*, 79 Wis. 147; 24 Am. St. Rep. 702. See *Deeds of Married Women*, *supra*, and *Sealed Instruments and Persons against Whom Reformation may be Granted*, *infra*, for further matter under this head.

Notes.—If there has been mistake or fraud in the giving of a note, it may be reformed, in equity, according to the general principles above announced, to conform to the actual agreement between the parties: *Miller v. McCarty*, 47 Minn. 321; 28 Am. St. Rep. 375; *Kropp v. Kropp*, 97 Wis. 137; *Lee v. Percival*, 85 Iowa, 639; *Fisher v. Barnett*, 56 Ill. App. 649; *McClure v. Little*, 15 Utah, 379; 62 Am. St. Rep. 938; *Abbott v. International etc. Loan Assn.*, 86 Tex. 467; *Wallace v. Tice*, Oregon, Jan., 1898; *Loudermilk v. Loudermilk*, 98 Ga. 780. An omission caused by fraud or mistake may be thus remedied: *Smith v. Brunk*, 14 Colo. 75, *Hathaway v. Brady*, 23 Cal. 121; *Parker v. Schaller Bank*, 98 Iowa, 246. A mistake in the execution of negotiable paper may always be corrected unless the rights of third parties have intervened: *German Nat. Bank v. Butchers' Tallow Co.*,

97 Ky. 84; Fuller v. Hawkins, 60 Ark. 304; McLeod v. Free, 96 Mich. 57; and such relief may be obtained by way of defense: Hansford v. Freeman, 99 Ga. 376.

If, however, the evidence is not clear, convincing, and satisfactory in showing that there has been either fraud or mistake, the reformation of the instrument will be denied: Rector v. Collins, 46 Ark. 167; 55 Am. Rep. 571; Bell v. Americus R. R., 76 Ga. 754; Banfield v. Banfield, 24 Or. 571; Davenport v. Lowry, 78 Ga. 89; Hackemack v. Wiebrock, 172 Ill. 98; George v. Howard, 56 Iowa, 646. A note cannot be reformed where it was written as intended, though words were omitted by a mistake as to the legal effect of the omission: Hicks v. Coody, 49 Ark. 425.

Leases.—If a lease, through fraud or mutual mistake, fails to express the intention of the parties thereto, it may be reformed, in equity, upon parol testimony, to effect such intention, where the proof of the fraud or mistake and what the real agreement was is clear, satisfactory, and convincing: Kleinsorge v. Rohse, 25 Or. 51; Silbar v. Ryder, 63 Wis. 106; Reid v. Cook, 88 Iowa, 717; Reed v. Root, 59 Iowa, 359. Under section 3399 of the Civil Code of California, above quoted in this note, the only fraud necessary to sustain a judgment reforming a lease is such as may be inferred from the failure of the lessee to correct a mistake of the lessor known or suspected by the lessee at the time of the execution of the lease: Wilson v. Moriarty, 88 Cal. 207. In the absence of clear proof that a lease does not contain the real agreement between the lessor and lessee, and no satisfactory showing of fraud or mistake is made, the instrument will not be reformed: Kleinsorge v. Rohse, 25 Or. 51; Fritzler v. Robinson, 70 Iowa, 500, 503; Habbe v. Viele, 148 Ind. 116; Liggett v. Shira, 159 Pa. St. 350; Duke of Sutherland v. Heathcote [1892], 1 Ch. 475, affirming the same case [1891], 3 Ch. 504; especially to enable the plaintiff to assert a forfeiture: Thompson v. Christie, 138 Pa. St. 230. A court of equity will not insert in a lease important conditions which the parties never fully assented to: Ladwig v. Haase, 54 Wis. 311. It seems that, in an action of forcible entry and detainer, brought by a landlord against a tenant for rent, the defendant cannot interpose an answer alleging that in drawing up the lease certain terms thereof were omitted by mutual mistake, and asking that the lease be reformed to express the contract of the parties: Phillips v. Port Townsend Lodge, 8 Wash. 529.

Releases may, according to the general principles above stated, be reformed in equity, but where no fraud is proved, nor any mistake, mutual or otherwise, no case is made for the reformation of a release: Husted v. Van Ness, 1 N. Y. App. Div. 120; Harbeck v. Pupin, 145 N. Y. 70; Fletcher v. Jackson, 23 Vt. 581; 56 Am. Dec. 98; Gerdtzen v. Cockrell, 50 Minn. 546; Sandlin v. Ward, 94 N. C. 490.

Sealed Instruments.—If an instrument, or agreement of any kind which requires a seal, is, by accident or mistake, executed without one, a court of equity may reform it by compelling a seal to be affixed, or otherwise: Gaylord v. Pelland, 169 Mass. 356, 359; Springfield etc. Sav. Bank, 127 Mass. 516; Harding v. Jewell, 73 Me. 426; Bernards Tp. v. Stebbins, 109 U. S. 341; Henkleman v. Peterson,

154 Ill. 419; overruling *Trustees v. Otis*, 85 Ill. 179; *Gilbreath v. Dilday*, 152 Ill. 207; *Keith v. Henkleman*, 68 Ill. App. 623; *Conover v. Brown*, 49 N. J. Eq. 156; *Lebanon Sav. Bank v. Hollenbeck*, 29 Minn. 322; *Bullock v. Whipp*, 15 R. I. 195; *Probate Court v. May*, 52 Vt. 182; *Beardsley v. Knight*, 10 Vt. 185; 33 Am. Dec. 193. A bill to reform a mortgage by adding a scroll or seal of the mortgagors, and to foreclose it as reformed, may be sustained, though the statute of limitations has run against the mortgage; if it be regarded as a simple contract, and not as a specialty: *Allen v. Elder*, 76 Ga. 674; 2 Am. St. Rep. 63.

Suretyship—Guaranty.—A written instrument which, by mistake, fails to express the agreement of the parties may be reformed, and then enforced against a surety: *Neininger v. State*, 50 Ohio St. 394; 40 Am. St. Rep. 674. A bond may be corrected, as against sureties, by adding seals to their signatures, omitted by mistake, and should be so corrected where its recitals show that it was the intent of the parties that it should be sealed and made sufficient: *Henkleman v. Peterson*, 154 Ill. 419, overruling *Trustees v. Otis*, 85 Ill. 179. A guaranty for the collection of a bond and mortgage may, in a proper case, be reformed so as to become a guaranty of the payment of the bond and mortgage: *Simpkins v. Taylor*, 81 Hun, 467. If the proof as to mistake, in an action to reform a written guaranty, is doubtful or unsatisfactory, there can be no reformation, for the writing will be held to express correctly the intention of the parties; *Deseret Nat. Bank v. Burton*, Utah, April, 1898.

Voluntary Conveyances cannot, as a rule, be reformed in equity on the ground of fraud or mistake, and want of consideration is a good defense to a bill for rectifying such conveyances: *Powell v. Morisey*, 98 N. C. 426; 2 Am. St. Rep. 343; *Dawson v. Dawson*, 1 Dev. Eq. 93; 18 Am. Dec. 573; *Baker v. Pyatt*, 108 Ind. 61; *Kilpatrick v. Strozler*, 67 Ga. 247; *Else v. Kennedy*, 67 Iowa, 376; *Gwyer v. Spaulding*, 33 Neb. 573; *Stone v. King*, 7 R. I. 358; 84 Am. Dec. 557; though there are cases holding that a court has jurisdiction to reform or rectify a voluntary conveyance or settlement as well as a conveyance or settlement for value. The extension of the equitable power of reformation to reform voluntary conveyances was formerly not regarded with favor or as sound, but there is a present tendency to uphold the power of reformation in such cases, upon the same principles as apply to other conveyances: See *Finucan v. Kendig*, 109 Ill. 198; *Crockett v. Crockett*, 78 Ga. 647; *Bonhote v. Henderson* [1895], 1 Ch. 742; [1895], 2 Ch. 202. In *Shears v. Westover*, 110 Mich. 505, it is held that an error in the description of land in a voluntary conveyance will not be corrected in equity unless all of the parties consent.

Wills cannot be reformed or corrected in equity so as to make them conform to the intention of the testator. Equity has jurisdiction to entertain suits for the reformation of conveyances and agreements, but it has no analogous jurisdiction for the correction or reformation of wills: See monographic note to *Goode v. Goode*, 66 Am. Dec. 633, on reforming and correcting wills in equity; *Robbins v. Magee*, 76 Ind. 381; *Chambers v. Watson*, 56 Iowa, 676; *Patch v.*

White, 117 U. S. 210; Wood v. White, 32 Me. 654; 52 Am. Dec. 654; Schlottman v. Hoffman, 73 Miss. 188; 55 Am. St. Rep. 527; Sturgis v. Work, 122 Ind. 134; 17 Am. St. Rep. 349; Bingel v. Volz, 142 Ill. 214; 34 Am. St. Rep. 64; but equity does have jurisdiction to correct a clear mistake in the description of land devised by will, where the mistake is demonstrable from the structure and scope of the will itself: Thomson v. Thomson, 115 Mo. 56; and where the effect of the reformation is not to vary the terms of the will: Christman v. Colbert, 88 Minn. 500.

MCGREGOR v. CONE.

[104 IOWA, 465.]

INTERSTATE COMMERCE—DELETERIOUS ARTICLE—POWER OF STATE.—A state has no right to interfere with, or to attempt to regulate, interstate commerce in an article on the ground that it is deleterious to the inhabitants of the state, so long as it is recognized in the commercial world, by the laws of Congress, and by the decisions of the courts as a commodity in which a right of traffic exists.

INTERSTATE COMMERCE—SALE OF CIGARETTES—REGULATION OF BY STATE—UNCONSTITUTIONAL STATUTE.—Cigarettes are a recognized commercial commodity. Hence, a state statute which prohibits the sale of cigarettes within the state by all persons except jobbers who do an interstate business with customers outside of the state is in contravention of section 8, article 1, of the federal constitution, conferring upon Congress the exclusive right to regulate commerce among the several states, and is void, so far as it amounts to such a regulation.

INTERSTATE COMMERCE—"ORIGINAL PACKAGE"—WHAT IS.—An "original package," within the meaning of the interstate commerce law, is a bundle put up for transportation or commercial handling, and usually consists of a number of things bound together, convenient for handling and conveyance. It is the unit which the carrier receives, transports, and delivers as an article of commerce—the identical package delivered by the importer to the carrier at the initial point of shipment, in the exact condition in which it was shipped.

INTERSTATE COMMERCE—CIGARETTES—"ORIGINAL PACKAGE"—COMMON PINE BOX.—If packages of cigarettes, each package containing ten cigarettes, and sealed with an internal revenue stamp, are packed in a common pine box, for convenience of shipment, such box is the original package of commerce; and when it is opened or "broken," the packages of cigarettes are subject to the police power of the state as a part of the common mass of property therein.

INTERSTATE COMMERCE—SALE OF CIGARETTES—VIOLATION OF STATE STATUTE.—If an importer, after bringing into the state stamped packages of cigarettes, packed in a common pine box, for convenience of shipment, opens the box and sells one of the packages to a customer, who applies for it, the sale violates a statute of the state which prohibits the sale of cigarettes within the state by all persons except jobbers doing an interstate business.

INTERSTATE COMMERCE—CIGARETTES—"ORIGINAL PACKAGE"—DECISION OF REVENUE OFFICERS AS TO FORCE OF.—In determining whether or not there has been a viola-

tion of a state anti-cigarette law, the fact that the internal revenue department has recognized a package containing ten cigarettes as an "original package," for the purpose of taxation, is not conclusive, as the repacking of such packages in additional coverings is optional with the manufacturer in placing them upon the market. The package so recognized is not the original package of commerce, within the meaning of the interstate commerce law.

Habeas corpus sued out by McGregor, the plaintiff and appellant, against Cone, a sheriff. McGregor had been convicted and sentenced for a violation of what was familiarly known as the "Anti-Cigarette Law." He was restrained under a warrant of commitment issued by a justice of the peace, and said that his commitment was illegal for the reason that while he sold cigarettes, yet the same were sold in the "original package" in which they were imported, and that the law under which he was convicted was unconstitutional in so far as it applied to such sales. The petitioner was remanded by the trial court, and he appealed from the order and judgment.

W. W. Fuller and John W. Redmond, for the appellant.

J. W. Grimm, county attorney, and Milton Remley, attorney general, for the state.

⁴⁰⁶ DEEMER, C. J. The case was tried upon the following agreed statement of facts: "The defendant purchased in Illinois from the American Tobacco Company, a corporation organized under the laws of the state of New Jersey, and having a factory for the manufacture of cigarettes in the city of New York and state of New York, a number of packages of cigarettes, manufactured at its said factory in New York by said company. Each said package so purchased contained ten cigarettes, and had upon it the ⁴⁰⁷ label bearing the name or brand of the cigarettes contained in it, the caution notice, the number of the factory and of the revenue district in which the factory was located, the name of the state in which such factory was, the name of the manufacturer, and the internal revenue stamp for ten cigarettes, duly canceled, pasted across the end of each of said packages so as to seal the same (which said stamp had to be broken and destroyed in opening said package), and all other requirements of the acts of Congress and of the internal revenue laws governing the packing, shipment, and sale of cigarettes. The packages of cigarettes so purchased by said defendant of said company were placed in a common pine box, for convenience of shipment, without any other packing or inclosure around or about said packages of ten cigarettes each, and were so shipped by said company to said defendant by a common carrier, from the

factory of said company in the city of New York, in the state of New York, to the warehouse and offices of said company in the city of Chicago, in the state of Illinois, and from Chicago, in the state of Illinois, shipped by said company in the same package, without opening the same, to the defendant, in Cedar Rapids, in the state of Iowa, by common carrier. Upon the arrival of such pine box at the place of business of defendant in Cedar Rapids, in the state of Iowa, he opened said pine box, by taking the lid therefrom, and sold one of the packages, containing ten cigarettes, in Cedar Rapids, Linn county, Iowa, on July 10, 1896, to Andrew Harmon. The remaining packages of cigarettes were not removed from said pine box, and are still therein as they were received. The one package, of ten cigarettes, sold to said Andrew Harmon, was of like kind in every respect with the other packages in the same box, and said Andrew Harmon was not a customer ⁴⁶⁸ outside of the state, but resided in the state of Iowa." It further appears that the American Tobacco Company submitted to the department of internal revenue of the general government a sample package of cigarettes similar to the one for the selling of which appellant was convicted, and received the following letter in response:

"American Tobacco Company, No. 45 Broadway, New York, N. Y.

"Gentlemen: In reply to your inquiry of April 3d, submitting a sample package of cigarettes bearing thereon the internal revenue stamp and the printed marks and caution label, and inquiring as to the necessity for a reinclosing, in an additional covering of paper, wood, or other material in placing the same upon the market, you are notified that said package, being a statutory quantity, and properly stamped and canceled, and bearing thereon the caution label and the number of the manufactory, the district and state, and the number of cigarettes contained therein, meets with the approval of this bureau, being a proper and original package, as contemplated by existing laws and regulations. Therefore, the repacking of said packages in additional coverings of wood, paper, et cetera, is optional with the manufacturer, and does not concern this bureau. The option is permissible, under existing regulations (series 7, No. 8, Revised, page 46, and Internal Revenue Record, vol. 32, page 365, dated November 22, 1886).

"Respectfully yours,

"(Signed) JOHN W. MASON,

"Commissioner."

The so-called "Anti-Cigarette Law," being chapter 96 of the acts of the twenty-sixth general assembly, prohibits the sale of cigarettes within this state by all persons whomsoever, save jobbers doing an interstate business with customers outside of the state. Appellant contends that this law is unconstitutional, in so far as it interferes with commerce among the several states; that the ⁴⁶⁹ package which he sold was an "original package"; and that his detention was and is illegal. This statute was enacted in virtue of the police power of the state, and, unless it infringes upon some constitutional provision, it is undoubtedly valid. The contention is, however, that the statute is invalid in so far as it interferes with, interrupts, or embarrasses interstate commerce, on the theory that the federal constitution, article 1, section 8, confers upon Congress the exclusive right to regulate commerce among the several states. It seems to be well settled by the later decisions of the United States court that, while the states have the undoubted right to control their purely internal affairs, yet whenever the law enacted in the exercise of this power amounts to a regulation of commerce among the states, as it does when it directly or indirectly inhibits the receipt of an imported commodity, or its disposition, before it has ceased to become an article of trade between one state and another, it comes in conflict with a power which has been invested in the general government, and is therefore void. That the use of the article is deleterious to the inhabitants of the state is not regarded as material, so long as it is recognized by the commercial world, by the laws of Congress, and by the decisions of the courts as a commodity in which a right of traffic exists: *Brown v. Maryland*, 12 Wheat. 419; *Leisy v. Hardin*, 135 U. S. 100; *In re Rahrer*, 140 U. S. 559; *Bowman v. Chicago etc. Ry. Co.*, 125 U. S. 465. That cigarettes are a recognized commercial commodity must be conceded, and it follows that, in so far as the law in question amounts to a regulation of commerce, it is unconstitutional and void. There must of necessity be a time, however, when an article which is the subject of interstate commerce becomes subject to the taxing power and police regulations of the state; a time when the article loses its character as an import, and ⁴⁷⁰ its owner becomes subject to local regulations. In the case of *Brown v. Maryland*, 12 Wheat. 419, it is said that the point of time when the prohibition ceases, and the power of the state to tax commences, is not the instant when the article enters the country, but when the importer has so acted upon it that it has become incorporated and mixed

up with the mass of property in the country, which happens when the original package is no longer such in his hands; that the distinction is obvious between a tax which intercepts the import as an import on its way to become incorporated with the general mass of property, and a tax which finds the article already incorporated with that mass by the act of the importer; and that the right to sell any imported article is an inseparable incident to the right to import it. In another case (*Bowman v. Chicago etc. Ry. Co.*, 125 U. S. 465, it is said in the dissenting opinion that while the question involved did not require a decision, yet the argument of the majority conducts to the conclusion that the right of transportation included by necessary implication the right of the consignee to sell in unbroken packages at the place where the transportation terminated. This language was subsequently approved by a majority of the court in the case of *Leisy v. Hardin*, 135 U. S. 100. Again, in the *License cases*, 5 How. 504, Chief Justice Taney said: "These state laws act altogether upon the retail or domestic traffic within their respective borders. They act upon the article after it has passed the line of foreign commerce, and become a part of the general mass of property in the state." Chief Justice Waite declared in the *Bowman* case that "it is only after the importation is completed, and the property incorporated is mingled with and becomes a part of the general property of the state, that its regulations can act upon it, except in so far as it may be necessary to insure safety in the disposition of the import until thus mingled." In the case of *Leisy v. Hardin*, 135 U. S. 100, the beer was held for sale in ⁴⁷¹ the original barrels and cases in which it was imported, and none of it was broken or opened upon the premises. Chief Justice Fuller said, referring to these facts, that the brewers who brewed and owned the beer had the right to import it into this state, and also had the right to sell it, by which act alone it would become mingled in the common mass of property within this state, and that up to that time the state had no power to interfere, by seizure or otherwise. All the cases agree that, when the article is once sold by the importer, it then becomes subject to the taxing and police power of the state; and it is quite generally held that the same result follows when the original package in which it is imported is broken, and the several parcels are so mingled with other property, or so exposed for sale, as to destroy the identity of the package as imported: See *Brown v. Maryland*, 12 Wheat. 419; *Robbins v. Shelby Co. Taxing Dist.*, 120 U. S. 489.

As the law is confessedly valid, except in so far as it interferes with or impedes commerce between the states, it follows that the constitutional provision has reference to and protects that which is the subject of commerce, and only so long as it preserves the form and remains the exact subject of importation. It is the "original package" which is protected. The question then arises, What is an "original package"? The definition commonly accepted, and believed by us to be correct, is that "it is a bundle put up for transportation or commercial handling, and usually consists of a number of things bound together, convenient for handling and conveyance": See *State v. Board of Assessors*, 46 La. Ann. 146; 49 Am. St. Rep. 318; *Keith v. State*, 91 Ala. 2; *United States v. One Hundred and Thirty-Two Packages*, 76 Fed. Rep. 364. In the case of *State v. Winters*, 44 Kan. 723, it is said: "The original package was and is the package as it existed at the time ⁴⁷² of its transportation from one state to another." It is quite apparent, we think, that the words "original package" have reference to the unit which the carrier receives, transports, and delivers as an article of commerce. The importer decides for himself the size of the package which he desires to import, and when he delivers it to the carrier for transportation he gives it the initial step, and from that time until sold in that form or broken, and transformed, it is the subject of interstate commerce. But when sold or broken, or when it changes form, it ceases to be an article of interstate commerce, and no longer enjoys this protection. The original package, then, is that package which is delivered by the importer to the carrier at the initial point of shipment, in the exact condition in which it was shipped. If sold, it must be in the form as shipped or received; for, if the package be broken after such delivery, it, by that act alone, becomes a part of the common mass of property within the state, and is subject to the laws of that state enacted in virtue of its police power.

Appellant contends that the internal revenue department has declared the small package sold by him to be "an original package," and that this is conclusive. We do not so regard it. The package referred to in the letter from the internal revenue department is the one recognized by that department for the purposes of taxation, and has no reference to the unit of commerce which is protected by the federal constitution. The commissioner of internal revenue, in his letter heretofore set forth, says that "the repacking of said packages in additional coverings is optional with the manufacturer, and does not concern this

bureau." In the case at bar the "original package," the unit of commerce, was broken, the contents exposed to sale, and one of the small packages was sold. Such sale was, as it seems to us, of an article which had lost its distinctive character ⁴⁷³ as an import, and was therefore in violation of law. In this respect it differs from most of the cases to which our attention has been called, for in all but one of them it appears that the sales were of original and unbroken packages: See *in re Minor*, 69 Fed. Rep. 235; *State v. McGregor*, 76 Fed. Rep. 957; *Sawrie v. Tennessee*, 82 Fed. Rep. 615. The one case, and the only one, which we have been able to find holding to a contrary doctrine, *State v. Goetz*, 43 W. Va. 495, 64 Am. St. Rep. 871, fails to recognize the distinction between the original package of commerce and that recognized by the internal revenue department of the general government for the purposes of taxation. There are a number of liquor cases in line with our holding as to what constitutes an original package: *State v. Winters*, 44 Kan. 723; *Keith v. State*, 91 Ala. 2; *State v. Board of Assessors*, 46 La. Ann. 146; 49 Am. St. Rep. 318. See, also, *State v. Chapman*, 1 S. Dak. 414; *Haley v. State*, 42 Neb. 556; 47 Am. St. Rep. 718; *Commonwealth v. Zelt*, 138 Pa. St. 615; *Commonwealth v. Bishman*, 138 Pa. St. 639; *Commonwealth v. Paul*, 170 Pa. St. 284; 50 Am. St. Rep. 776; *Commonwealth v. Schollenberger*, 156 Pa. St. 201; 36 Am. St. Rep. 32; *In re Beine*, 42 Fed. Rep. 545; *Smith v. State*, 54 Ark. 248; *In re Harmon*, 43 Fed. Rep. 372; *United States v. One Hundred and Thirty-two Packages*, 76 Fed. Rep. 364; *Tinker v. State*, 96 Ala. 115. We find no cases in the federal courts holding to a contrary doctrine. On the contrary, it is said specifically in the case of *Brown v. Maryland*, 12 Wheat. 419, that, "if the importer breaks up the original packages for sale or for use, or changes the form in which they were imported, or they pass into second hands, the goods will lose their distinctive character as imports, and become subject to the taxing power of the state; and in such cases nothing that has been said will protect an article so acted upon by the importer": *Welton v. Missouri*, 91 ⁴⁷⁴ U. S. 275. See, also, *State v. Shapleigh*, 27 Mo. 344; *State v. North*, 27 Mo. 464.

The question as to what constitutes an original package of liquor was considered in the following cases, heretofore decided by this court: *Collins v. Hills*, 77 Iowa, 181; *State v. Coonan*, 82 Iowa, 400; *State v. Miller*, 86 Iowa, 639; *Hopkins v. Lewis*, 84 Iowa, 691. The matter was also referred to in *Wind v. Her*, 93 Iowa, 324. What was said in *Collins v. Hills*, 77 Iowa, 181,

must be regarded as dictum, for it was not essential to the determination of the question involved. Moreover, the decision of the controlling point in that case was overruled by the supreme court of the United States. Reference to the point in *Wind v. Iler*, 93 Iowa, 324, was purely *arguendo*, and *Hopkins v. Lewis*, 84 Iowa, 691, contains nothing in conflict with the views here expressed. Moreover, the rule of the *Collins* case was questioned. *State v. Miller*, 86 Iowa, 639, simply follows *State v. Coonan*, 82 Iowa, 400. In the *Coonan* case, it appeared that Coonan was the agent of nonresident importers; that he kept an "original package house," which was leased by his principals; that the liquor was shipped by the importers, consigned to themselves; that the beer was put into bottles and sealed and labeled at the brewery, and for convenience of shipment was placed in open frame boxes, with twenty-four separate compartments; that the whisky was sealed and labeled, and packed in barrels, and that Coonan removed the bottles from boxes and barrels, and sold them as sealed and labeled. It was held, under this state of facts, citing the *Collins* and *Beine* cases, that the separate bottles were the original packages. We have already seen that the *Collins* case should not be regarded as authority upon the proposition involved, and an examination of the *Beine* case will disclose that it does not hold to any such rule. The contrary seems to be the holding in that case. ⁴⁷⁵ Aside from this, however, the facts are essentially different from those in the case at bar. Here the appellant is a resident of the state, engaged in the business of selling cigarettes at retail, and as such is amenable to all its laws which do not deprive him of some constitutional right. When he received the package which had been made up by the manufacturer, and started upon its journey, he opened it and displayed its contents, not the package, for sale; and it affirmatively appears that he sold one of the small parcels from the original package to a customer who applied for the same. We think these distinguishing features are quite important; for if it be the rule that all imported goods, no matter how treated or sold, are exempt from state taxation or regulation, it is apparent that the state must forego the exercise of the power of taxation and regulation, in cases where the right has never heretofore been questioned: See *State v. Wheelock*, 95 Iowa, 577; 58 Am. St. Rep. 442. But, aside from these distinctions, we are abidingly convinced that the *Coonan* case, if it holds to the doctrine contended for by the appellant, is wrong, and ought to be overruled; and in so far as it may be said to

be out of harmony with this opinion, and the great weight of reason and authority, it is overruled.

The order of the district court remanding the appellant is right, and it is affirmed.

INTERSTATE COMMERCE—STATE STATUTES—CIGARETTES—ORIGINAL PACKAGE.—State statutes attempting to regulate interstate commerce are unconstitutional and void: Note to *Bennett v. American Exp. Co.*, 23 Am. St. Rep. 779. In *State v. Goetze*, 48 W. Va. 495; 64 Am. St. Rep. 871, paper boxes of cigarettes, properly labeled and stamped, each box containing ten cigarettes, manufactured in another state, were imported into West Virginia, all packed in a wooden box for convenience of shipment. It was held that each paper box was an original package; that the importer could sell the cigarettes, one paper box at a time, without being amenable to a state law requiring a license for selling cigarettes at retail; and that such a law, so far as it applied to cigarettes imported and sold in the original package by the importer, was a regulation of interstate commerce and void. Other cases, however, hold that original packages are bundles put up for transportation or commercial handling, and usually consist of a number of things bound together convenient for handling and conveyance: Note to *Commonwealth v. Paul*, 50 Am. St. Rep. 782.

WESTCOTT v. BINFORD.

[104 IOWA, 645.]

DEVISE TO A PERSON NAMED, AND HIS "HEIRS," CREATES ONLY A LIFE ESTATE, WHEN—INTENTION OF TESTATOR.—If land is devised to one "to hold the same during the term of his natural life," and to have the use, rents, and profits of it during such time, but with a provision that he shall have no power to convey or dispose of the same for a period longer than his life, and that, at his death, it shall descend to his heirs, the clear intention of the testator is to create a life estate only, and the fact that he is presumed to have intended a devise of all his interest in the property, and that the heirs of the devisee cannot be definitely known until his death, does not create in him a larger estate than the testator intended him to have.

WILLS—CONSTRUCTION—INTENT MUST CONTROL.—In construing wills, the intention of the testator, when ascertained, and not in violation of law, must control.

WILLS—CONSTRUCTION OF—RULE IN SHELLEY'S CASE CANNOT OVERRIDE.—There is a material distinction between wills and deeds in the application of the rule in Shelley's case, and that rule, even if it is in force, will not be allowed to override the manifest and clearly expressed intention of the testator, but such intention will always be carried into effect if it can be ascertained.

Action at law to recover the possession of real property and damages for its detention. A demurrer to the petition was sustained. The plaintiffs refused to plead further, and judgment

was rendered in favor of the defendants for costs. The plaintiffs appealed.

R. W. Hargrave and Struble & Stiger, for the appellants.

Binford & Snelling, and J. H. Preston, for the appellees.

646 ROBINSON, J. The material facts admitted by the demurrer are substantially as follows: In October, 1865, John Westcott, a resident of Marshall county, died testate, seised, in fee simple, of real property in the town of Marshall, in Marshall county. The will of the decedent was admitted to probate, and contains the following provisions: "I do give, devise, and bequeath unto my wife, Hannah Westcott, the real estate situated in said county of Marshall and state of Iowa, described as follows, to wit: Lots numbered 4 and 5, block numbered 19, and lots numbered 7 and 9 in block numbered 6, all in the town of Marshall; to have and to hold said real estate in her own right. I do further give and bequeath unto my wife, Hannah Westcott, the real estate situated in said county of Marshall and state of Iowa described as follows: Lots numbered 7 and 8, in block 11, in the town of Marshall; to have and to hold the same during the term of her natural life, and at her decease to be divided among my children as follows: The east one-third of said lot [7 in block 647 11] I do give and bequeath to my son William Edwin Westcott, to have and to become possessed of the same at the death of my said wife, and to hold the same during the term of his natural life." The west one-third of the same lot was devised to Mrs. Scott, the middle one-third to Mrs. Gibson, and separate parts of lot 8, in block 11, were devised to Mrs. Hardenberg, Joseph Leander Westcott, and Charles Alfred Westcott, on the same terms and conditions as those which applied to the devise to William Edwin Westcott. All of the devisees named, excepting the wife, were children of the testator. The last paragraph of the will is as follows: "My said children are to have the use, rents, and profits of their portion of said lots number 7 and 8, in block numbered 11, in the town of Marshall, respectively, during the term of their natural lives. They are to have no power to convey or dispose of the same, their respective portions, for a longer period than during their natural lives, respectively. At the death of my children aforesaid, their respective portions of said lots numbered 7 and 8 descend to their heirs, respectively, said heirs to have absolute title to their respective portions." In August, 1875, William Edwin Westcott and his wife executed to Thaddeus Binford a

deed of special warranty, which purported to convey the interest of Westcott in the east one-third of lot 7, in block 11, in words as follows: "Conveying hereby all the right and title I have in the above property by virtue of the last will and testament of John Westcott, deceased." William Edwin Westcott died in January, 1892. The plaintiffs are his children, and the husbands and wives of the children who are married. The children claim to own, and in this action seek to recover, the part of the lot conveyed by their father to Binford. The defendants are Binford and W. E. Snelling and their wives. Binford and Snelling claim the property in question through the deed of Westcott ⁴⁴⁸ to Binford, and are in possession of it. The grounds of the demurrer are, in substance, that the petition does not state facts which show that the plaintiffs are entitled to relief, for the reason that it shows that William Edwin Westcott obtained a title in fee simple to the property in question through the will of his father, and that his title was transferred by his deed to Binford.

1. The question we are required to determine involves the consideration of the rule in Shelley's case, 1 Coke, 88. A statement of that rule, found in 4 Kent's Commentaries, 215, and several times quoted by this court, is as follows: "When a person takes an estate of freehold, legally or equitably, under a deed, will, or other writing, and in the same instrument there is a limitation by way of remainder, either with or without the interposition of another estate, of an interest of the same legal or equitable quality, to his heirs, or heirs of his body, as a class of persons to take in succession, from generation to generation, the limitation to the heirs entitles the ancestor to the whole estate": See Pierson v. Lane, 60 Iowa, 61; Zavitz v. Preston, 96 Iowa, 52. The rule is of common-law origin, and has been the subject of much controversy. Where the rule is enforced in all its rigor, it is held to be a rule of property, and not of construction, and a grant or devise to a person named, "and his heirs," would be subject to the rule, and no declaration, however unequivocal, that the ancestor should have the estate for life only, or that his heirs should take as purchasers, would be effective. The particular intent thus clearly stated would be compelled to yield to the intent expressed by the use of words having a technical meaning: Trumbull v. Trumbull, 149 Mass. 200. It was said in Daniel v. Whartenby, 17 Wall. 689, that where the rule is in force, "if the testator has used technical language which brings the case within the rule, a declaration,

however positive, that the rule shall not ⁶⁴ apply, or that the estate of the ancestors shall not continue beyond the primary express limitation, or that his heirs shall take by purchase, and not by descent, will be unavailing to exclude the rule, and cannot affect the result." In *Silva v. Hopkinson*, 158 Ill. 386, it is said, with reference to the application of the rule: "No principle of law is better established than that, although the testator did intend the first taker to have but a life estate, yet, if the technical words are used, that intention, be it ever so clearly expressed, will be defeated, and the first devisee allowed to take the whole estate. . . . The only method in which an instrument employing the word 'heirs' can be shown not to be within the rule is by showing that the word was not employed in its strict legal sense. . . . It is well settled that the words must be given their legal effect, even though the subsequent words are inconsistent therewith, unless they make it clear that they were not so used": See, also, *Conger v. Lowe*, 124 Ind. 368; *Kleppner v. Laverty*, 70 Pa. St. 73; 2 Washburn on Real Property, *272; 1 Jones on Real Property, sec. 601 et seq; Hay's Principles for Express Disposition of Real Property, 96; 22 Am. & Eng. Ency. of Law, 495, and note.

The rule was not designed to defeat the intention of the grantor or testator, but gave to certain words, as "heirs," such force and effect that when used they were conclusively presumed to show an intent to vest the estate in the ancestor, in fee. Theoretically, the rule was not applied to ascertain the intent of the grantor or testator, but to declare its effect when ascertained: *Smith v. Collins*, 90 Ga. 411; *Allen v. Craft*, 109 Ind. 476; 58 Am. Rep. 425; 22 Am. & Eng. Ency. of Law, 495. The practical operation of the rule has been such, however, that it has not met with general favor in this country. It has never been adopted in some states, and, in others, where it was ⁶⁵ once in force, it has been abolished by statute. At the present time it is in force in but few of the states: 1 Jones on Real Property, 602, and notes; *Daniel v. Whartenby*, 17 Wall. 639. It has been recognized to some extent in this state, but has never been formally adopted or declared to be in force. It was referred to in *Zuver v. Lyons*, 40 Iowa, 513, but held not to apply to the matter there in controversy. In *Hanna v. Hawes*, 45 Iowa, 441, it was said: "Conceding the rule in *Shelley's* case, 1 Coke, 88, to be the law in this state, it is not applicable. It is evident that the concession stated was for the purposes of that case only, and was not intended to be of general applica-

tion. In *Slemmer v. Crampton*, 50 Iowa, 302, the rule was again referred to, but this court held, in effect, that the devise involved in that case was not within the rule. In *Kiene v. Gmehle*, 85 Iowa, 313, the rule was discussed, but not found to apply in that case. In *Zavitz v. Preston*, 96 Iowa, 52—the latest case decided by this court, in which the rule was considered—it was said: “Whether the rule in Shelley’s case is in force in this state we need not determine.” Two cases have been decided by this court, in which the rule was applied. In the first of these (*Pierson v. Lane*, 60 Iowa, 60), it was held that a conveyance of real estate to “Minerva Pierson, and the heirs of her body, begotten by her present husband,” vested in Mrs. Pierson the title in fee. Whether the rule in Shelley’s case was in force in this state was a mooted question, but the discussion turned upon the statute de donis (13 Edw. 1 Ch. 1), with the conclusion that it was not in force as a part of the common law of this state. It was held that a conveyance to Mrs. Pierson vested in her the title in fee simple, and it is fair to say that the holding was based upon the rule in Shelley’s case, although no statement to that effect was made. The second case in which that rule was applied is *Broliar v. Marquis*, 80 Iowa, 49, which involved a conveyance ⁶⁵¹ by John Marquis to “Annie Marquis and her children and joint heirs with her and myself and Mercelly Marquis and Ella Marquis.” It was conceded by the parties in that case that under the holding in *Pierson v. Lane*, 60 Iowa, 60, and *Case v. Dwire*, 60 Iowa, 442, the children of Annie Marquis took nothing by the conveyance. Whether the concession thus made was well founded, or whether the rule in Shelley’s case was in force in this state, was not discussed nor decided.

The decisions of this court to which we have referred comprise all the cases, so far as we are advised, in which this court has considered the rule in question, and it cannot be said that they show that it has been adopted or should be enforced in this state. The most that can be said of the recognition of the rule by this court is that in the cases of *Pierson v. Lane*, 60 Iowa, 60, and *Broliar v. Marquis*, 80 Iowa, 49, it was assumed to be in force. Whether the decision in those cases might not well have been placed on other grounds than the rule in Shelley’s case, and whether the concession made in the case last named was well founded, we need not determine. It should be noticed, however, that both cases involved deeds of conveyance of real property, and not wills.

A material distinction between wills and deeds of conveyance, in the application of the rule, has been observed by the authorities. It is said of the rule in 4 Kent's Commentaries, *216, that "there is more latitude of construction allowed in the case of wills, in furtherance of the testator's intention; and the rule seems to have been considered as of more absolute control in its application to deeds." In *Ridgeway v. Lanphere*, 99 Ind. 253, it was said: "The rule in *Shelley's case*, 1 Coke, 88, is the law in this state, and, in all cases where the facts make it applicable, we must enforce it, although we may think there was not much reason for it at the time of its adoption and none at all under the existing system of tenures ⁶⁵² and conveyances. But in accepting the rule we take it as construed and enforced by the courts which formulated and proclaimed it. Pressed by the evils wrought by the rule, and shocked by the great number of instances in which it operated to utterly overthrow the intention of the testator, these courts, centuries ago, affirmed that there existed an important difference between wills and deeds, and that the rule should not be so strictly enforced in the case of a will as in the case of a deed. It has long stood as the law that there is a material distinction between wills and deeds, and that the rule in *Shelley's case* will not be allowed to override the manifest and clearly expressed intention of the testator, but that the intention will always be carried into effect if it can be ascertained. It is true that, where the words used are such as to bring the case within the rule, it will be given full force and effect; but, where the context clearly shows that the testator annexed a different meaning, that meaning will be adopted, and the rule will not be allowed to frustrate his intention": See, also, *McIlhinny v. McIlhinny*, 137 Ind. 411; 45 Am. St. Rep. 186. It was said in *Jones on Real Property*, section 606, that, "as applied to wills, the rule is not allowed to override the manifest and clearly expressed intention of the testator, but the intention will always be carried into effect if it can be ascertained. . . . This distinction between deeds and wills in the application of the rule is in accordance with the general rule applicable to the construction of wills, that the intention of the testator shall, so far as possible, be observed."

The rule of interpretation of general application, which this court has invariably followed, is that the intention of the testator, when ascertained, and not in violation of law, must control: *Hopkins v. Grimes*, 14 Iowa, 77; *Benkert v. Jacoby*, 36 Iowa, 275; *Hanna v. Hawes*, 45 Iowa, 439; *Meek v. Briggs*, 87

Iowa, 616; 43 Am. St. Rep. 410; ⁶⁵³ Kiene v. Gmehle, 85 Iowa, 316; Zavitz v. Preston, 96 Iowa, 52. In Kiene v. Gmehle, 85 Iowa, 316, it was said: "There are some respectable authorities that hold that the rule in Shelley's case is independent of the intention of the donor or devisor; that it is absolute and imperative. Such application of the rule is not sanctioned by reason or the current of adjudicated cases in this country." The devise considered in that case was to the daughter of the testator, "for and during her lifetime, . . . and on her demise the said estate, both real and personal, shall descend to and vest in such heirs of her body begotten, in fee simple"; and it was held to give the daughter only a life estate in the real property of the testator. In Zavitz v. Preston, 96 Iowa, 52, a devise of real estate to a grandson "during his natural life," and at his death "to go to and be equally divided between his lawful heirs and next of kin," was held to vest in the grandson a life estate only. The rule in Shelley's case was referred to, but, without determining that it was in force in this state, we said that "it certainly cannot be invoked to defeat the intent of the testator." In Slemmer v. Crampton, 50 Iowa, 302, a devise of land to Maria A. Avery, "to be used, occupied, and enjoyed by her after she becomes of the age of legal majority, during her natural life only," and, after her death, "to the heirs of her body," was held to vest in Maria A. Avery a life estate only, notwithstanding the rule in Shelley's case.

It is well known that wills are frequently drawn hurriedly, by persons not skilled in the use of technical terms, and words are often used in them in a sense not technically accurate. That is true of the word "heirs": Furenes v. Severtson, 102 Iowa, 322. To hold that when used it must be given a technical effect, that it must be taken as a word of limitation, and not of purchase, notwithstanding the fact that the context shows clearly that it was not used in a technical sense, does not seem to us to be in harmony ⁶⁵⁴ with the best rules of interpretation, nor with the weight of authority, nor to be founded in reason, nor to be demanded by anything in the letter or spirit of the laws of this state, or the condition and policy of its people and their institutions. The conditions which the rule was originally designed to meet do not exist here, and to hold that it applies to the will under consideration would be to go counter to the rules of interpretation which this court has always applied to wills, to overrule in effect many cases which we have decided, and to some of which we have referred, and to establish a rule which

has been so unjust in its operation as to be abandoned or modified by nearly all of the states in which it was once in force.

The will under consideration gave to William Edwin Westcott the property in controversy, "to hold the same during the term of his natural life," and provided that he should have the use, rents, and profits of it during that time. The will also provided that he should "have no power to convey or dispose of the same" for a longer period than during his natural life, and that at his death it should descend to his heirs. That the will was intended to create in the ancestor a life estate only, is too clear for controversy, and the fact that the testator will be presumed to have intended a devise of all his interest in the property, and the further fact that the heirs of the devisee could not be definitely known until his death, would not create in him a larger estate than the testator intended him to have. Upon his death the absolute title to the property vested in his heirs. The language of the will brings it within the rule of the cases of *Slemmer v. Crampton*, 50 Iowa, 302, *Kiene v. Gmehle*, 85 Iowa, 313, and *Zavitz v. Preston*, 96 Iowa, 52, to which we have referred. We do not find it necessary to determine whether the rule in *Shelley's case* is in force in this state, but hold that, if it be in force, it cannot defeat the intent of a testator, as expressed by ⁶⁵⁵ the language of his will. It follows from what we have said that the demurrer to the petition should have been overruled, and the judgment of the district court is reversed.

WILLS—CONSTRUCTION—DEVISE—RULE IN SHELLEY'S CASE.—In the construction of wills, the intention of the testator, when apparent, overrides all established rules of interpretation, if not contrary to some positive rule of law: Note to Succession of Allen, 55 Am. St. Rep. 309. The rule in *Shelley's case* is not one which results in ascertaining or executing the will of the grantor or testator, and it has been repudiated in some of the states: See monographic note to *Carpenter v. Van Olinder*, 11 Am. St. Rep. 100, on the rule in *Shelley's case*; *Wilkerson v. Clark*, 80 Ga. 367; 12 Am. St. Rep. 258. It is the law of Indiana, but in applying it there a material distinction is recognized between wills and deeds; and as to wills the rule will not be allowed to override the manifest and clearly expressed intention of the testator, which will always be carried into effect if it can be ascertained: *McIlhinny v. McIlhinny*, 137 Ind. 411; 45 Am. St. Rep. 186. A devise to a person named, and his "heirs" may create only a life estate: See extended note to *Carpenter v. Van Olinder*, 11 Am. St. Rep. 102.

CALLANAN v. VOTRUBA.

[104 IOWA, 672.]

JUDGMENT — RECORD — VALIDITY.—The record is the only proof of a judgment, and it is, therefore, essential to the validity of a judgment that it be spread upon the records as required by law.

JUDGMENT—"RENDITION"—LIEN—NECESSITY OF RECORD.—A judgment is not rendered, so as to be a lien from the time of its "rendition" until it is entered on the records, as prescribed by the statute, although an entry or direction therefor has been signed by the judge and indorsed by the clerk as "Filed."

Action to quiet title against two judgments in favor of the defendant. On the cross-petition of the defendant, a decree was entered, establishing the judgments as liens on the plaintiff's lot. The plaintiff appealed.

J. J. and E. A. Davis, for the appellant.

Day & Corry, for the appellee.

672 LADD, J. In September, 1895, McClure was the owner of a lot in the city of Des Moines, and conveyed it by warranty deed, delivered to plaintiff September 27, of the same year, in pursuance of an oral contract so to do made September 3d, previous. The agreed consideration was eight hundred dollars, of which four hundred and sixteen dollars was credited on an antecedent indebtedness, and three hundred and eighty-four dollars, a mortgage on the lot, subject to which Callanan took the deed. Two judgments by default were ordered in favor of the defendant and against McClure September 24, 1895, and entries therefor were signed by the trial judge and indorsed "Filed" by the clerk, on the **673** same day, but were not recorded in the record-book or entered until the 28th or 30th of the same month, and after the conveyance to Callanan. Are these judgments liens on the land? Section 3801 of the code provides that "judgments in the supreme or district courts of this state or in the circuit or district courts of the United States, within this state, are liens upon the real estate owned by the defendant at the time of such rendition, and also upon all he may subsequently acquire, for the period of ten years from the date of the judgment." What is meant by the "time of such rendition?" Rendering a judgment is the judicial act of the court in pronouncing the sentence of the law upon the facts in controversy, as ascertained from the pleadings and the evidence; and, technically, the ministerial act of spreading upon the record a statement of the final conclusion reached by the court is not included therein: Black on

Judgments, sec. 106; *Shuster v. Rader*, 13 Colo. 329; *Blatchford v. Newberry*, 100 Ill. 489; *Conwell v. Kuykendall*, 29 Kan. 707; *Hall v. Tuttle*, 6 Hill, 38; 40 Am. Dec. 382, and note; *Stephens v. Santee*, 49 N. Y. 39; *Durant v. Comegys*, 2 Idaho, 809; 35 Am. St. Rep 267; *In re Cook's Estate*, 77 Cal. 220; 11 Am. St. Rep. 267. But, in construing this statute, its relation to others on the same subject, and the sense in which the words are used, as determined by this court, must be considered. Every final adjudication of the rights of the parties in an action is a judgment: Code, sec. 3769. All judgments and orders must be entered on the record of the court, and must specify clearly the relief granted or order made in the action: Code, sec. 3784. It will be noticed that the definition of a "judgment" in the code differs somewhat from that of some of the lexicographers, in that it is a final adjudication: *Zeigler v. Vance*, 3 Iowa, 528; *Taylor v. Runyon*, 3 Iowa, 674 474. See definitions by authorities collected in 12 Am. & Eng. Ency. of Law. In *Humphrey v. Havens*, 9 Minn. 318, it was held that, where a writ of error must be issued within a year after the "rendition of judgment," the time began to run from the entry of judgment or order, on the record. The question was first suggested in this court in *Brown v. Scott*, 2 G. Greene, 454, Kinney, J., remarking: "We are at a loss to know how the justice could have rendered a judgment that would have any force or virtue without rendering that judgment in proper form in the docket which he is required by law to keep for that purpose. It is true, he might, in his mind, resolve upon entering the judgment; but, unless put into shape and form, it would be as though no judgment at all had existed in the mind." In *Case v. Plato*, 54 Iowa, 64, the court, through Day, J., after quoting the statutes, said: "It is apparent from the foregoing provision that it is essential to the validity of a judgment that it should be entered upon the record-book. This is the book in which a statement of the proceedings of the court is kept, and to which appeal must always be made to determine what has been done. The theory of the law is that it is kept under the direction and supervision of the judge, is approved by him, and constitutes the only proof of his acts." In *Balm v. Nunn*, 63 Iowa, 641, the opinion is by Beck, J., who said: "There can be no judgment until it is entered in the proper record of the court. It cannot exist in the memory of the officers of the court, nor in the memoranda entered upon the books not intended to preserve the record of judgments. . . . It is not competent to prove a judgment in any other way than by

the production of the proper record thereof." *Aetna Life Ins. Co. v. Hesser*, 77 Iowa, 381, 14 Am. St. Rep. 297, seems to be decisive. In that case, the judgment was erroneously indexed, and the court, in holding it was not a lien superior to a subsequent mortgage, bases its conclusion ⁶⁷⁵ on three grounds: 1. No constructive notice was imparted owing to the failure to index; 2. The judgment, before it becomes a lien, must be of record, i. e., entered in the record-book required by the statute; 3. A judgment is not rendered, so as to be effective and capable of enforcement, until it is "made up, finished, stated, or delivered" in the form and manner, and entered of record as required by the statutes. Appellee insists the last two grounds amount to no more than dicta, but these are not stated in the way of argument, but as conclusions of law. In *Winter v. Coulthard*, 94 Iowa, 312, the court had announced its decisions; but these had not been entered of record, and the executions were held invalid because no judgments existed. The judge's calendar is not a record of the court, but entries therein announce his conclusions, and are intended for the guidance of the clerk: *Traer v. Whitman*, 56 Iowa, 443; *Miller v. Wolf*, 63 Iowa, 233; *State v. Manley*, 63 Iowa, 344; *Burroughs v. Ellis*, 76 Iowa, 649. While not proof of a decree or judgment, such minutes may tend to show a decree or judgment has been ordered: *In re Edwards' Estate*, 58 Iowa, 431. If the record is the only proof of a judgment, as has been repeatedly held by this court, then how can a judgment be said to have been rendered before spread on the records, when its very existence prior to that time cannot be established? If the statute making the judgment a lien "at the time of such rendition" refers to the time of announcement by the judge, rather than when entered on the proper books, it would certainly be capable of enforcement by execution: Code, sec. 3954. But it was adjudged otherwise in *Winter v. Coulthard*, 94 Iowa, 312. If the court has announced judgment, the clerk may complete the record after the term: Code, sec. 242. But until the record is prepared, no evidence exists of the rendition of the judgment. These records are under the control of the court ⁶⁷⁶ (Code, sec. 248), and through them it speaks the final adjudication defined by the statute as a judgment. Until so rendered, there is no judgment. The code contains no provisions relating to judgment forms signed by the judge, and these amounted to no more than directions for judgments. Until recorded, they were not such, but merely evidence that the court had ordered judgments, and approved their form. This

view finds support in *Babcock v. Wolf*, 70 Iowa, 676, and *Guthrie v. Guthrie*, 71 Iowa, 744. In these cases, decisions were, by agreement, to be made in vacation, and were written and signed by the judges before the expiration of their terms of office, though not delivered in the clerk's office until afterward. In the former it is said: "Now, we think the decision was made when it was deposited in the express office at Afton. Under the agreement of the parties, it was as complete then as if there had been no agreement, and the judge had entered a decision in his minutes in open court, because the parties agreed that the decision was not to be made at Clarinda." But it did not have the force of a judgment until spread upon the records as required by law.

Reversed.

JUDGMENT—RENDITION—RECORDING—LIEN.—A judgment is not regarded as "rendered" until it has been indexed. A judgment or transcript, before it becomes a lien, must be of record in the books required by statute, and the record is not completed until an entry is made in the index: *Aetna v. Life Ins. Co. v. Hesser*, 77 Iowa, 381; 14 Am. St. Rep. 297. There can be no judgment capable of being docketed, or enforced in any manner, until it is entered in the judgment-book: *Rockwood v. Davenport*, 37 Minn. 583; 5 Am. St. Rep. 872. A judgment is "rendered" when ordered by the court, but is not entered until actually written in the judgment-book: *Durant v. Comegys*, 2 Idaho, 809; 35 Am. St. Rep. 267.

CASES
IN THE
SUPREME COURT
OF
MINNESOTA.

LOBDILL v. LABORING MEN'S MUTUAL AID ASSN.

[69 MINNESOTA, 14.]

INSURANCE AGAINST ACCIDENT—TOTAL DISABILITY.
Under a policy insuring against loss of time suffered through accidental injuries "wholly and continuously disabling the insured from transacting any and every kind of business pertaining to his occupation" of merchant, he may recover if accidentally thrown from his bicycle, thereby dislocating the thumb of his right hand, breaking loose some of his teeth, and so injuring or jarring his head and neck as to affect his spine and nerves to such an extent as to produce severe nervous prostration, rendering him wholly and continuously disabled from transacting any and every kind of business pertaining to his occupation.

INSURANCE AGAINST ACCIDENT—TOTAL DISABILITY.
Under a policy insuring against loss of time effected through accidental injuries "wholly and continuously disabling the insured from transacting any and every kind of business pertaining to his occupation," whole or total disability does not mean absolute physical inability to transact every kind of business pertaining to the occupation of the insured. It is sufficient if his injuries are of such character that common care and prudence require him to desist from the transaction of any such business so long as it is reasonably necessary to effect a cure. Inability to transact some kinds or branches of his business does not constitute total disability within the meaning of the policy, if he is able to transact other kinds or branches of his business.

INSURANCE AGAINST ACCIDENT—TOTAL DISABILITY.
Under a policy insuring against loss of time effected by accidental injuries, "wholly and continuously disabling the insured from transacting any and every kind of business pertaining to his occupation," ability to occasionally perform some single and trivial act connected with some kind of business pertaining to his occupation does not render his disability partial instead of total, provided he is unable, substantially, or to some material extent, to transact any kind of business pertaining to such occupation. The frequency and nature of the acts done are ordinarily for the consideration of the jury in determining whether the insured is totally disabled within the meaning of the policy.

B. Thayer, for the appellant.

C. D. Allen and Gray & Thompson for the respondent.

¹⁵ MITCHELL, J. The defendant, an accident insurance company, issued its policy to plaintiff, whereby it insured him as a merchant by occupation, under classification preferred, "in the sum of twenty-five dollars per week, against loss of time, not to exceed twenty-six consecutive weeks, resulting from bodily injuries effected through means aforesaid (of which there shall be external and visible signs), *wholly and continuously disabling said member from transacting any and every kind of business pertaining to the occupation above stated.*"

Plaintiff alleged that on May 21, 1895, and during the life of the policy, he was accidentally thrown from his bicycle, and violently thrown forward on his face, thereby dislocating the thumb of his right hand, breaking loose some of his teeth, and so injuring or jarring his head and neck as to affect his spine and nerves to such an extent as to produce severe nervous prostration, by reason of which injuries he was wholly and continuously disabled from transacting any and every kind of business pertaining to his occupation as a merchant for seventeen weeks. The principal contest is as to the construction of that part of the policy which we have italicized, and particularly of the term "wholly disabled." Accident insurance being of comparatively recent origin, the policies do not seem to have acquired any settled form, and the decisions construing them ¹⁶ are comparatively few, and do not seem to have agreed on any very definite meaning to be given to the term "total disability." Such authorities as there are will be found quite fully cited in Bacon on Benefit Societies, section 501, and in Niblack on Mutual Benefit Societies, sec. 401 et seq. See, also, 4 Harvard Law Rev. 180.

The cases which have placed a construction upon the term "total disability" might seem to be divided into two classes, viz., those which construe it liberally in favor of the insured, and those which construe it strictly against him. Among those of the first class may be cited Hooper v. Accidental etc. Co., 5 Hurl. & N. 545, 556; Young v. Travelers Ins. Co., 80 Me. 244; Turner v. Fidelity etc. Co., 112 Mich. 425; and of the second class, Lyon v. Railway Pass. Assur. Co., 46 Iowa, 631, and Saveland v. Fidelity etc. Co., 67 Wis. 174; 58 Am. Rep. 863. Any apparent conflict in the decisions may, however, be mostly reconciled in view of differences in the language of the policies, and

of the different occupations under which the parties were insured. As is well said in *Wolcott v. United etc. Ins. Assn.*, 55 Hun, 98: "Total disability must, from the necessity of the case, be a relative matter, and must depend largely upon the occupation and employment in which the party insured is engaged."

One who labors with his hands might be so disabled by a severe injury to one hand as not to be able to labor at all at his usual occupation, whereas a merchant or a professional man might by the same injury be only disabled from transacting some kinds of business pertaining to his occupation. In policies of this character the aim of the insurer usually is to get as large premiums as possible by incurring the least possible liability; and, on the other hand, after an accident occurs, the usual aim of the insured is to recover the greatest amount of indemnity for the least possible injury. All that the courts can do is to construe the contract which the parties have made for themselves; but, in doing so they should give it a reasonable construction, so as, if possible, to give effect to the purpose for which it was made.

There are a few propositions applicable to the construction of the policy under consideration which, under the evidence, are decisive of this case. The first is, that total disability does not mean absolute physical inability on part of the insured to transact any ¹⁷ kind of business pertaining to his occupation. It is sufficient if his injuries were of such a character that common care and prudence required him to desist from the transaction of any such business so long as it was reasonably necessary to effectuate a cure. This was a duty which he owed to the insurer as well as to himself: *Young v. Travelers' Ins. Co.*, 80 Me. 244. The second is, that under the particular terms of this policy, to wit, "from transacting any and every kind of business pertaining to the occupation above stated" (merchant), inability to perform some kinds of business pertaining to that occupation would not constitute total disability within the meaning of the policy. For example, the occupation of a retail country merchant (as plaintiff was) embraces various departments or kinds of business, such as keeping the books, making out accounts, and settling with customers; waiting on customers, and doing up their purchases in packages; also the handling and arranging of goods in the store. If an injury disabled the insured merchant from transacting one or more of these branches of the business, but left him able to transact others with due regard to his health, he would not be totally disabled within the meaning of this policy.

But the mere fact that he might be able, with due regard to his health, to occasionally perform some single and trivial act connected with some kind of business pertaining to his occupation as a merchant would not render his disability partial instead of total, provided he was unable, substantially or to some material extent, to transact any kind of business pertaining to such occupation. To illustrate this proposition by reference to the evidence in this case, it appears, as we shall assume, that on one or two occasions where the plaintiff went into his store when down town for other purposes he handed out some small article to a customer, and took the change for it. This would not necessarily prove that he was able to attend to the business of waiting on customers, and that he was not "wholly disabled" within the meaning of the policy. He might be able, on temporary visits to the store, occasionally to perform a trifling act of this nature, and yet be substantially and essentially unable to transact any kind of business pertaining to his occupation of merchant. The frequency and nature of these acts would be for the consideration of the jury in determining whether he was totally ¹⁸ disabled, but would ordinarily be by no means conclusive on that question.

It only remains to apply these principles or rules to the evidence. The evidence was, as might be expected, conflicting; but that introduced on part of the plaintiff reasonably tended to show that the dislocation of his thumb was by no means the most serious of his injuries; that by his fall he so injured his head and neck as to produce severe nervous prostration, which so seriously affected his general health and strength as to render him unable to transact, to any material or substantial extent, any part of his business as merchant; that due regard to his health required him wholly to desist from attempting to do so, and that he was so advised by his physician; that when at home he went down town several times a week to receive medical treatment from his physician, and to get shaved; that when he did so he would frequently go into his store, and sit down for a brief time, but when there took no part or interest in the transaction of the business except the trivial acts on two or three occasions already referred to; that upon the advice of his physician he went to Chicago to consult a medical specialist; that when he returned, his health not appearing to be improved, his family took him off on two occasions on a summer outing; and that it was not until the last of September or the first of October that he was sufficiently recovered to give any consider-

able attention to any part of his business. This evidence, in our judgment, justified the jury in finding that he was, for the full seventeen weeks, wholly disabled, within the meaning of the policy, from transacting any and every kind of business pertaining to his occupation as a merchant.

The requests to charge referred to in the assignments of error were properly refused, for the reason, if no other, that they all assumed that if the plaintiff on some particular date performed some single act connected with his business—as, for example, handing a customer a package of garden seeds, or a dozen of nails—it necessarily followed that he was not “wholly disabled” at that date within the meaning of the policy.

In his application for this insurance the plaintiff stated the value of his time to be twenty-five dollars a week. It cropped out on the trial that he held like insurance for like amounts in three other companies. As ¹⁹ no point was made on the trial but that he was entitled to recover, if at all, twenty-five dollars a week during his total disability on the policy in suit, the question of the effect of the other insurance on the amount he is entitled to recover is not before us.

Order affirmed.

INSURANCE—ACCIDENT—TOTAL DISABILITY.—The words “totally disabled from the prosecution of his usual employment” mean inability to do substantially all kinds of his accustomed labor to some extent. To recover in such case, the assured must be deprived of the power to do to any extent substantially all kinds of labor which constitute his usual employment: Note to North American Life etc. Co. v. Burroughs, 8 Am. Rep. 218, 219. An insured is entitled to recover for a total loss of business time, if his injury is such that he loses his time in the business in which he was engaged when insured, though there are other business pursuits from which the accident would not incapacitate him: Pennington v. Pacific Mut. Life Ins. Co., 85 Iowa. 468; 39 Am. St. Rep. 306. Contra, Baltimore etc. Relief Assn. v. Post, 122 Pa. St. 579; 9 Am. St. Rep. 147. See, also, Saveland v. Fidelity etc. Co., 67 Wia. 174; 58 Am. Rep. 863.

LANGEVIN v. BLOOM.

[69 MINNESOTA, 22.]

EXEMPTIONS—PURCHASE MONEY LIEN—RIGHT OF ASSIGNEE.—Under a statute providing that property mentioned is not exempt from attachment issued in an action for the purchase price thereof, or from execution issued upon any judgment rendered therein, an assignment of a note given for the purchase price of such property operates as an assignment of the right to collect it, and the assignee has the same right to sue and levy on the property that the vendor had.

W. Watts and E. P. Pierce, for the appellant.

M. O'Brien, for the respondent.

MITCHELL, J. The defendant, as constable, had levied on a buggy, the property of the plaintiff, on an execution on a judgment rendered against him in favor of one Ellington. This judgment was rendered upon a promissory note given by plaintiff to Sylvester and Finseth, and by them transferred to Ellington. The note was given for the purchase ²³ money of the buggy levied on. The buggy was exempt, unless subject to levy, under General Statutes 1894, section 5460, which provides that: "The property hereinbefore mentioned is not exempt from any attachment issued in an action for the purchase money of the same property, or from an execution issued upon any judgment rendered therein."

The only question is, whether the assignee of the note succeeded to the privilege or right of the vendor as against the exemption right of the vendee.

The authorities on this question are conflicting: See Thompson on Homesteads, sec. 336. Most of the cases consider it the same as or analogous to the question whether the equitable lien of a grantor of land for purchase money is assignable. Some courts hold that it is the mere personal privilege of the vendor, which is not assignable, and consequently will not pass by the assignment of the debt; while others view it as a privilege or right inherent in the contract, which goes with the debt like any other privilege, lien, or security. We think the latter view is correct on principle, as well as equitable. Unless the vendor can sell the debt accompanied by the privilege or right to levy on the property sold in the hands of the vendee, he does not get the full benefit of the right which the statute gives him. This right is one of the things which gives value to the debt. There is no reason in equity why the vendee should hold the property as exempt against process to collect the purchase money in favor of the assignee of the vendor, any more than if the process was in favor of the vendor himself. The theory upon which the statute cited was enacted, and upon which it is held constitutional, is that the buyer ought not, as against the seller, to hold the property as exempt, until he has paid for it, and that the property passes to the buyer subject to this quasi vendor's lien; that is, subject to the paramount right of the seller to make the purchase money out of it: *Rogers v. Brackett*, 34 Minn. 279.

It seems to us that there is no good reason, founded on either principle or policy, why the vendee should be allowed to hold the property freed from this right, simply because the debt for purchase money has been transferred by the vendor to a third party.

This precise question has never been passed upon by this court, ²⁴ although in *Kinney v. Duluth Ore Co.*, 58 Minn. 455, 49 Am. St. Rep. 528, we held that the assignment of a demand, which may be enforced under the mechanic's lien law, operates as an assignment of the right to a lien. *Harley v. Davis*, 16 Minn. 441 (487), is sometimes cited in textbooks as holding that the transferee of a note given in purchase of a chattel has no right, as against the vendee's right of exemption, to levy on the property, although the vendor himself might have done so; but an examination of the facts in that case will show that it is not authority for any such proposition. In *Hammond v. Peyton*, 34 Minn. 529, we held that the equitable lien of a grantor of real estate was not assignable; but the decision was expressly based upon the fact that we looked upon a grantor's equitable lien with disfavor, and did not desire to extend it further than we were compelled under the authorities, at the same time admitting that the decision was inconsistent with the analogies of the law.

Judgment reversed, and cause remanded, with directions to the district court to enter judgment in favor of the defendant.

VENDOR AND PURCHASER—RIGHTS OF ASSIGNEE OF PURCHASE MONEY NOTES.—The assignee of a note given in part consideration for the purchase price of land, to secure the payment of which the vendor reserved the legal title in himself, is entitled to have his debt satisfied out of the land: *Graham v. McCampbell*, Meigs, 52; 33 Am. Dec. 126. See extended notes to *Schnebly v. Ragan*, 28 Am. Dec. 199-202, and *Lagow v. Badollet*, 12 Am. Dec. 263, 264. By the transfer of a note given for the purchase price of real estate, the lien which the vendor has upon the land passes with it, as the note is the principal thing, and the lien is but an incident to secure its payment: *Conner v. Banks*, 18 Ala. 42; 52 Am. Dec. 209; *Upland Co. v. Ginn*, 144 Ind. 434; 55 Am. St. Rep. 181. Contra, *Jackman v. Hallock*, 1 Ohio, 318; 13 Am. Dec. 627; *Simpson v. Montgomery*, 25 Ark. 365; 99 Am. Dec. 228; *Richards v. Leaming*, 27 Ill. 431; 81 Am. Dec. 239.

BARTON v. PIONEER SAVINGS AND LOAN COMPANY.

[69 MINNESOTA, 85.]

BUILDING AND LOAN ASSOCIATIONS—FORFEITURE OF SHARES—ESTOPPEL.—Members holding shares in a mutual building association who default in the payment of their monthly installments of dues are presumed to assent to the unauthorized act of the directors in absolutely forfeiting their shares and the money paid in thereon, without sale and without notice, shortly after their default, and in appropriating the money so paid in for the benefit of members in good standing, when such members wait for more than four years after such forfeiture and after the distribution of such money in good faith, before they take any steps to protect their interests. In such case, the defaulting members and their assignee who brings the suit are estopped from denying that they have assented to or ratified the unlawful act of the directors.

BUILDING AND LOAN ASSOCIATIONS—UNAUTHORIZED ACT OF DIRECTORS—ESTOPPEL OF SHAREHOLDERS. It is inequitable for a shareholder, in a mutual building association, knowing that an act done by the directors in good faith for the benefit of the association, such as the unlawful forfeiture of his shares for delinquency in payments, is in fact unauthorized, to apparently acquiesce by his silence, but secretly reserve an option to repudiate the act in case of loss, or to enjoy its benefits if it proves profitable. Fairness requires that the dissenting shareholder should act promptly and make known his objections without unreasonable delay. If he fails to do so, his assent to the unauthorized act must be presumed, and he is estopped from denying that he has assented to or ratified such act.

G. D. Emery and Keith, Evans, Thompson & Fairchild, for the appellant.

M. F. Bowen, for the respondent.

80 COLLINS, J. Action by a party holding assignments of all the "right, title, and interest in law or equity" in and to certain certificates of stock held by defaulting shareholders in defendant corporation, a mutual building association organized under the provisions of the General Statutes of 1894, section 2794, to recover damages claimed on account of an alleged conversion of stock by the association.

The assignors subscribed for and received ten certificates in July, 1887. They paid their dues up to and including the month of December, 1890. They made default in January, 1891, and remained in default thereafter. The shares were declared forfeited in June, and the alleged conversion took place as early as July 1, 1891, at which time all payments made by the holders were declared forfeited, were converted to the use of the corporation, and, with other earnings, were distributed to all shares in good standing, and reported as so distributed to the

public examiner of the state, as required ⁸⁷ by law. No application for reinstatement was ever made, nor any claim for the amount alleged to have been converted, prior to the commencement of this action, in March, 1896. The assignments to the plaintiff bear date December 31, 1895. No notice of forfeiture was given to the defaulting shareholders; the shares were not offered for sale, nor were they sold; and no proceedings were had except that the board of directors adopted a resolution declaring the forfeiture, and then proceeded to distribute to the other shares the sum paid in, less an agreed percentage set apart for expenses. Except upon the single question to be considered hereinafter, the case is controlled by that of *Henkel v. Pioneer Sav. etc. Co.*, 61 Minn. 35. The court below so held, and, upon the question referred to, it held against defendant, ordering judgment in plaintiff's favor. The appeal is from an order denying defendant's motion for a new trial.

No attempt was made in the complaint or upon the trial to excuse or justify the default in payment of dues. The failure to pay appears to have been voluntary, with full knowledge on the part of the shareholders of the plan upon which the association was organized, their own contract with respect to a prompt payment of dues, entered into when they became members, and the method of forfeiture prescribed in the by-laws. The failure to pay was in total disregard of their obligations as such members. The by-laws, made a part of their contracts, provided for an absolute forfeiture to the association of their shares upon default in payment. They must be presumed to have known that the board of directors would promptly declare the forfeiture, and equally as promptly distribute the sums paid in to the remaining shares, and it must also be presumed that they knew that under the statutory provisions construed in the *Henkel* case this could not be done, although provided for in the by-laws and in the contracts with members. They must be presumed to have known that the shares in the association began to mature and become payable June 1, 1891, soon after their default, and that, in accordance with the by-laws, series of shares would mature monthly, would be paid, surrendered, and canceled; all of the earnings and profits, including moneys forfeited by defaulting members, less the expense, percentage, and amounts lost, being taken into consideration by the association when estimating its ⁸⁸ earnings, and when distributing the same among members whose shares were maturing monthly, commencing June 1, 1891. The fact was that in the years

1891, 1892, and 1893, in accordance with the scheme of organization for the maturing of stock in monthly series, shares of the same class as those assigned to plaintiff to the amount and value of over one million dollars became payable, which included the proportion the shares were entitled to from all forfeitures, said amount having been paid out to members as their shares matured. These several payments included, of course, the proportionate amounts received by means of the resolution and action in respect to the sums paid in by the defaulting shareholders in question. It also appears that this method of estimating earnings and making distribution of amounts forfeited was in accordance with the instructions received from the public examiner.

In short, it is evident, that, in accordance with the provisions of the by-laws and the custom of the association prior to the decision in the Henkel case, the amount paid in by these shareholders, and which plaintiff seeks to recover, was, long before the commencement of this action, paid out to shareholders in the same class, and that these defaulting shareholders knew, or are presumed to have known of this custom, as well as what actually transpired. With actual or presumed knowledge of the acts of the board of directors and the association, these shareholders, residing within this state, remained silent for more than four years. They have never objected in any manner except as might be inferred from the assignments in December, 1895. With power to enforce their rights under the law, and to compel an observance of the statutory requirements in case of default and forfeiture, these stockholders apparently acquiesced in what was being done in good faith for over four years. They failed to protest or to assert their rights, but finally, by means of the assignments, put it in the power of the plaintiff to institute an action nominally against the association, but really against the present members, who have acquired their interests upon the faith of the acquiescence, and out of whom the amount of plaintiff's judgment should he recover, will ultimately come.

Under such circumstances, we are of the opinion that the doctrine of equitable estoppel should be applied. In the case of *Pinkus v. Minneapolis etc. Co.*, 65 Minn. 40, an action in which a stockholder ⁸⁹ in a manufacturing corporation undertook to recover from it and from its directors the value of his proportionate share of property of the corporation exchanged—ultra vires and unlawfully, as he claimed—for stock in another corporation, this doctrine was approved and applied. It was

said, at page 47: "The equitable principles applicable to the facts of this case are too well settled to justify any extended discussion of them. Courts differ as to the precise designation of the ground upon which they deny relief to a dissenting stockholder, under the circumstances of this case. Some call it 'ratification,' others 'laches,' and still others an 'equitable estoppel.' If required to name the ground on which any relief to the plaintiff must be denied in this case, we should designate it a 'ratification by equitable estoppel,' but the name is immaterial: *Turner v. Kennedy*, 57 Minn. 104. It is inequitable for a stockholder, knowing that an act done by the directors and a majority of the stockholders, in good faith, for the benefit of the corporation, is in fact unauthorized, to apparently acquiesce by his silence, but secretly reserve an option to repudiate the act in case of loss, or to enjoy its benefits if it proves profitable. Fairness requires in such cases that dissenting shareholders should act promptly, and make known their objections without unreasonable delay. If they fail to do so, their assent to the unauthorized act will be presumed, and they will be estopped from denying that they have assented to or ratified the act."

A number of text-books were cited in support of this statement, and it cannot be doubted that it is well-settled law. The simple questions here are whether the doctrine is applicable in an action founded upon the rights of parties who have ceased to be stockholders in a corporation; and, if so, is this, upon the facts, a proper case for such application?

Both questions must be answered in the affirmative. Although the defaulting members had ceased to be stockholders, they still held a qualified interest in their share certificates and in the association—an interest which it was the duty of the board of directors to protect by a strict compliance with the law respecting forfeitures. To the extent of this interest it was the duty of the directors to protect those who had ceased to be members quite as much as it was their duty to protect others who remained members. And to the extent of their interest the directors continued to be the representatives of defaulting members as fully as they represented members in good standing. Having an interest to be represented and taken care of, members who dropped out of the association would be bound, in so far as that interest was concerned, in the same manner and to the same extent, as would those who remained, by the acts of their official representatives. If an act ultra vires

or illegal was performed by the directors which affected the former and their rights, it could in no way be distinguished from a like act so performed and affecting actual shareholders. The plaintiff is simply attempting to enforce a right which accrued to the shareholders as such when active membership ceased.

While the cases are not numerous, the doctrine of equitable estoppel through laches and acquiescence has been applied in actions brought to avoid illegal forfeitures of shares: *Prendergast v. Turton*, 1 *Younge & C. Ch.* 98, and cases cited in 23 *Am. & Eng. Ency. of Law*, 825, notes 8, 9. On principle, such actions cannot be distinguished from that at bar.

We need not again allude specially to the facts upon which is predicated our conclusion that this is a very proper case for the application of the doctrine that fairness with the association and its members required of the defaulting shareholders that they should have protected their interest promptly, and should have asserted their rights without unreasonable delay. Not having done so, their assent to the unlawful appropriation of the amounts they paid in must be presumed, and they and their assignee are estopped from denying that they assented to or ratified such appropriation.

The order appealed from is reversed, and a new trial granted.

ESTOPPEL BY SILENCE—WHEN ARISES.—Silence does not create an estoppel unless there was a duty to speak: *New York Rubber Co. v. Rothery*, 107 *N. Y.* 310; 1 *Am. St. Rep.* 822; nor does mere silence, or some act done where the means of knowledge are equally open to both parties: *Blodgett v. Perry*, 97 *Mo.* 263; 10 *Am. St. Rep.* 807. But if one, by his acts or conduct, voluntarily causes another to believe in the existence of certain facts, and induces him to act upon that belief so as to change his previous position, the former is estopped to aver a different state of facts: *Robinson Bank v. Miller*, 153 *Ill.* 244; 46 *Am. St. Rep.* 883. Silence of a party having full knowledge of his own rights so as to intentionally permit others to be deceived and misled in relation to them, will conclude him from afterward interposing his claim to the prejudice of the party thus deceived or misled: *Titus v. Morse*, 40 *Me.* 348; 68 *Am. Dec.* 665; *Phillipps v. Clark*, 4 *Met.* 348; 83 *Am. Dec.* 471.

STATE v. TOOLR.

[69 MINNESOTA, 104.]

EXTRADITION—REVOCATION OF WARRANT.—The governor of a state may effectively revoke his extradition warrant for the surrender of an alleged fugitive from justice at any time before he is taken out of the state.

EXTRADITION—REVOCATION OF WARRANT—CONCLUSIVENESS.—If the governor of a state has revoked his warrant for

the surrender of an alleged fugitive from justice, no inquiry can be made in a proceeding on habeas corpus on behalf of such fugitive as to the ground of such revocation, and the prisoner must, therefore, be discharged.

Draper, Davis & Hollister and C. C. McCarthy, for the appellant.

T. P. Price and E. M. Card, for the relator.

¹⁰⁵ MITCHELL, J. Upon the requisition of the governor of Illinois for the extradition of the relator as a fugitive from justice, the governor of Minnesota issued his warrant directed to all the peace officers of the state, and particularly to the sheriff of Itasca county, commanding them to arrest and detain the relator, and deliver him to the agent of the state of Illinois. Under the warrant the sheriff of Itasca county arrested the relator, but upon habeas corpus he was, by the court commissioner of that county, subsequently ordered discharged from custody. From that order the sheriff appealed to this court pursuant to the provision of the Laws of 1895, chapter 327.

It now appears from an affidavit and supplemental pleadings filed in behalf of the relator, the allegations of which are not traversed by the sheriff, that since this appeal was taken the governor of Minnesota, upon a rehearing of the matter, made and issued an order directed to the sheriff of Itasca county annulling and revoking the warrant for the arrest of the relator, and directing the sheriff to make due return to him of that and all former orders, and that in pursuance of such order the sheriff has returned the warrant to the governor.

The question that confronts us at the outset is whether the governor had the power to revoke his warrant, for, if he had, there is now no warrant in existence upon which the relator can be arrested ¹⁰⁶ or detained in custody. In that case, he would necessarily have to be discharged, and it would be useless to review the action of the court commissioner. It is a matter of common knowledge that the governors of states have been and are in the habit of recalling and revoking such warrants whenever they become satisfied that they were improvidently issued. The exercise of the assumed power to do this is so frequent, and of such long continuance, that it has become what may be not improperly called the common law of the country on the subject. The existence of this power has been so generally conceded that the question has not often come before the courts, but whenever it has they have invariably held that the governor of a state has this power.

The question was, so far as we can ascertain, first judicially considered in Massachusetts by Justice Bigelow in 1837, and the power of a governor to revoke a warrant of rendition upheld, although, when the case was subsequently brought before the full court, the question was not decided: *Wyeth v. Richardson*, 10 Gray, 240. See, also, *In re Carroll*, 11 Chic. Leg. News, 14. The only case we can find in which the question has been passed upon by the highest court of a state is *Work v. Corrington*, 34 Ohio St. 64, 32 Am. Rep. 345, in which, after an exhaustive review of executive and judicial precedents, the court held that, if a warrant for the surrender of a fugitive from justice is obtained in a case in which it should not have been issued, the governor may revoke it; and, where a warrant has been revoked, no inquiry will be made in a proceeding on habeas corpus on behalf of the alleged fugitive as to the grounds of such revocation; also that this power is not limited to cases where the papers presented are insufficient or defective on their face. The views of the textwriters are to the same effect: *Spear on Extradition*, 440; *Moore on Extradition*, sec. 620.

The principal argument of counsel against the existence of the power of the governor to revoke a warrant once issued is that under the constitution of the United States, in the case of interstate extradition, the duty of the governor to issue a warrant on the production of the requisition in due form is imperative and ministerial, and not discretionary and judicial. We do not feel called upon to go into any extended discussion of the general subject of interstate ¹⁰⁷ rendition, and with the limited time at our command for investigation we are not prepared to do so. We shall merely say that it is unquestionably true that when a case is presented which is clearly one contemplated by the federal constitution, the governor has no discretion, but it is his imperative duty to issue the warrant. That duty, however, is one of imperfect obligation, for, if the governor refuses to perform it, we know of no power, state or federal, to compel him to do so.

But we are not prepared to assent to the proposition that, in determining whether a case contemplated by the constitution is presented, the governor upon whom the demand is made is vested with no discretion, even where the papers are on their face sufficient and in due form. We all know as a matter of fact that governors do exercise a discretion in such cases, and if they are satisfied that the demand is made for some ulterior and improper purpose—as, for example, the collection of a private debt

—they refuse to issue a warrant. If a governor may exercise such a discretion in regard to issuing the warrant, we do not see why he may not exercise the same discretion in regard to revoking it; and, if he does revoke it, his reasons for so doing can no more be inquired into than his reasons for refusing to issue it in the first instance. The existence of the power to revoke would seem necessary, in order to prevent great abuses and wrongs. A warrant is, of necessity, almost always issued *ex parte*, and the governor is liable to be imposed upon by those demanding it, or, for some other cause, to issue it improvidently. It would seem that in such cases the same officer who had the exclusive power to issue the warrant should have the power to remedy the wrong by revoking it. Of course, to be effective for any purpose, the warrant must be revoked before the alleged fugitive is taken out of the state.

Ordered, that the relator be discharged from custody.

EXTRADITION—REVOCATION OF WARRANT—REVIEW BY HABEAS CORPUS.—If a warrant for the surrender of a fugitive from justice is obtained in a case in which it should not have been issued, the governor may revoke it, whether issued by himself or his predecessor: *Work v. Corrington*, 34 Ohio St. 64; 32 Am. Rep. 345, and extending note; monographic note to *Matter of Fetter*, 57 Am. Dec. 393. In regard to matters of extradition, the judiciary may review and control the action of the governor in regard to points of law, but cannot interfere in regard to any matters within his discretion. It is within his discretion to issue, or refuse to issue, a warrant of arrest in extradition, or to revoke it when issued, if in his opinion it is sought for ulterior purposes: *In re Sultan*, 115 N. C. 57; 44 Am. St. Rep. 433. When such revocation has been made, the grounds thereof may not be inquired into on habeas corpus: *Work v. Corrington*, 34 Ohio St. 64; 32 Am. Rep. 345. See *Kurtz v. State*, 22 Fla. 36; 1 Am. St. Rep. 173.

MCLEAN v. SWORTZ.

[69 MINNESOTA, 123.]

GARNISHMENT—PROPERTY RECEIVED BY GARNISHEE AFTER SERVICE.—Under a statute providing that the service of the summons upon the garnishee shall attach and bind all property belonging to the defendant in his hands at the date of such service, the garnishee cannot be held for property coming to his possession or control after the time of the service of the summons in the proceedings against him, although it comes into his possession or control on the same day as the service. Such statute cannot be construed as if it read, “during the day of such service.”

GARNISHMENT—JUDGMENT UPON DISCLOSURE.—If judgment is asked against the garnishee, upon his disclosure, which is not evasive, it cannot be granted if the disclosure does not affirmatively show the liability of the garnishee.

Morse & Sweetser, for the appellants.

C. R. Fowler, for the respondent.

120 START, C. J. This is an appeal by the plaintiffs from an order of the municipal court of the city of Minneapolis denying their motion for judgment against the garnishee, and discharging him. The trial court based its action upon the ground that the disclosure does not show that at the time the garnishee summons was served the garnishee had any property in his hands belonging to the defendant.

The property sought to be reached in the hands of the garnishee was four carloads of apples, represented by the same number of bills of lading. It is claimed by the garnishee that two of the bills of lading came to his possession and control on the day the garnishee summons was served upon him, but after the time of such service, and that the other two were received by him on the day following, and not before. The trial court accepted this construction of the disclosure, and discharged the garnishee. The plaintiffs claim that this was error, for the following reasons:

1. Because the service of the garnishee summons attached and bound all property of the defendant which came to the possession or control of the garnishee during the entire day on which the service was made, although it came to his possession after the time the summons was actually served. Such is not the law. To support a judgment in favor of a plaintiff against the garnishee, the disclosure, where the motion for judgment is, as in this case, based upon it, must show that at the time of the service of the summons upon him he had property belonging to the defendant in his possession or control, or was then indebted to him. The garnishee ¹³⁰ cannot be held for the property of the defendant coming to his possession or control after the service of the summons in the proceedings against him: *Nash v. Gale*, 2 Minn. 265 (310). This is the uniform rule in all jurisdictions.

It is claimed, however, by the plaintiff that our present statute (Gen. Stats. 1894, sec. 5309), which provides that "the service of the summons upon the garnishee shall attach and bind all the property in his hands at the date of such service," must be construed as if it read "during the day of such service." It is true, as claimed, that the statute in force at the time the case referred to was decided contained the words "from the time of the service of such summons," but the substitution for this clause of the terser expression "at the date

of such service," found in the present statute, indicates no intention to change the meaning of the statute in the particular here in question. The history of the statute proves this. In its original form it read: "The person summoned as a garnishee, from the time of the service of such summons, shall be deemed liable to the plaintiff in such suit to the amount of the property in his hands, or possession, or under his control": Rev. Stats. 1851, c. 91, sec. 3; Pub. Stats. 1858, c. 80, sec. 3.

In 1860, the whole subject of garnishment was revised, and all prior laws on the subject repealed, and the section in question was re-enacted in the words of the present statute: See Laws 1860, c. 70. This chapter was reported by the revisers and adopted by the legislature as title 10 of chapter 66 of the General Statutes of 1866.

If there had been no other change in the statute except to substitute therein the word "date" for "time," it might possibly tend to support the construction claimed by the plaintiff. One of the accepted and authoritative definitions of the word "date" is the point of time at which a transaction or event takes place. One of its synonyms is "time." Thus we say, at the date of the filing of a deed or other instrument, when we wish to indicate the precise time the act was done. It is obvious that the word is used in this sense in this statute.

2. The plaintiffs urge, as a further reason why the trial court erred in making the order, the claim that the disclosure does not show ¹³¹ that the property came to the control of the garnishee after the service of the summons. It certainly does not appear from the disclosure that there was any property of the defendant within the control of the garnishee at the time of the service of the summons.

When judgment is asked against the garnishee upon a disclosure which is not evasive, it will not be granted if the disclosure does not affirmatively show the liability of the garnishee: *Cole v. Sater*, 5 Minn. 378 (468); *Schafer v. Vizona*, 30 Minn. 387; *Vanderhoof v. Holloway*, 41 Minn. 498.

It cannot be said in this case that the disclosure was evasive, as no effort seems to have been made by plaintiff to ascertain definitely from the garnishee whether or not any of the bills of lading came into his possession before the service of the garnishee summons. It may be fairly inferred from what is stated in the disclosure that two of the bills of lading came into the possession of the garnishee on the same day of the service, but not until afterward, and the other two not until the next day.

In any event, the trial court did not err in making the order appealed from, and it must be affirmed.

So ordered.

GARNISHMENT—PROPERTY ACQUIRED AFTER LEVY OF WRIT.—To render a person liable as garnishee, he must have in his possession, belonging to the defendant, property, money, credits, or effects, or he must be indebted to the defendant: *Smith v. Davis*, 1 Wis. 447; 60 Am. Dec. 890; *Carson v. Allen*, 2 Pinney. 457; 2 Chand. 123; 54 Am. Dec. 148. Process operates only upon such interests of the debtor as exist at the time it is served, and not on such as may afterward arise: *Arrington v. Screws*, 9 Ired. 42; 49 Am. Dec. 408. It relates only to the time of service; and if there is no indebtedness at that time from the garnishee to the defendant in attachment, plaintiff will not be entitled to judgment, although it may appear that between the time of service and answer, the garnishee became indebted and paid the debt to the defendant in attachment: *Roby v. Labuzan*, 21 Ala. 60; 56 Am. Dec. 237. Contra, *First Nat. Bank v. Jagers*, 31 Md. 38; 100 Am. Dec. 53. See *Northfield etc. Co. v. Shapleigh*, 24 Neb. 635; 8 Am. St. Rep. 224.

GARNISHMENT—ANSWER OF GARNISHEE—ENTRY OF JUDGMENT THEREON.—A motion for judgment upon garnishee's answer is in the nature of a demurrer to evidence, and if the facts stated do not raise or establish a liability, or if the garnishee's liability is positively denied, the plaintiff in attachment must fail: *Davis v. Pawlette*, 3 Wis. 300; 62 Am. Dec. 690. Judgment must not be given upon the answer, unless it clearly makes the garnishee chargeable: *Pierce v. Carleton*, 12 Ill. 358; 54 Am. Dec. 405, and note. See monographic note to *Session v. Stevens*, 46 Am. Dec. 341-346.

LANE v. EATON.

[69 MINNESOTA, 141.]

TRUSTS—CHARITABLE USES—DEVISE TO UNINCORPORATED SOCIETY—CERTAINTY OF BENEFICIARY.—An unincorporated voluntary association constituting a branch of the Salvation Army, whose membership is fluctuating and uncertain, cannot be the beneficiary of a trust under a statute requiring such beneficiary to be certain or capable of being rendered certain.

TRUSTS—DEVISE TO UNINCORPORATED SOCIETY—INCORPORATION IN ORDER TO TAKE.—Incorporation within a reasonable time may make an unincorporated voluntary association, constituting a local branch of the Salvation Army, competent to become the beneficiary of a trust created by will, under a statute providing that on the incorporation of a religious society, any estate devised in trust for it shall vest in the corporation as fully as if it had been legally incorporated from the date of its religious organization. Such reasonable time within which to incorporate does not extend beyond the time for the hearing of the application for the decree of distribution under the will creating the trust.

PERPETUITIES—ARROGATION OF RULE AGAINST.—The rule against perpetuities, so far as it applies to a trust to estab-

lish and maintain a meeting-house for a religious society, is abrogated by statute in Minnesota. (Minn. Gen. Stats., sec. 3040.)

CHARITABLE USES—DEVISE, WHEN ABSOLUTE GIFT. A devise of the "rest, residue, and remainder of my estate," to a named church, "absolutely to be used by said church or its trustees in aiding the cause of home and foreign missions equally," is an absolute valid gift to the church and not a devise in trust, when such church is incorporated and authorized by statute to acquire property by gift for mission purposes, and to accept any gift in trust for the purposes for which it is given.

H. J. & A. E. Horn, for the plaintiffs, and appellants.

W. B. McIntyre, G. E. Budd, F. G. B. Woodruff, and A. Tighe, for the defendants and appellants.

142 CANTY, J. This action was brought by the executors for the construction of the will of George Eaton, deceased.

1. The will contains the following provision: "I give, devise, and bequeath one other equal share or third part, to be first selected and set apart by my executors or the survivor of them, to John W. Lane and John C. Quinby, or the survivor of them, in trust, to keep the same carefully invested, and to receive the rents, profits, and income thereof, and to pay and apply the same, together with the principal sum, or third part, to and for the use of the branch of the Salvation Army, so called, located in the said city of St. Paul; said principal and interest accruing thereon to be permanently invested in the purchase of a lot and the erection thereon of a place of worship where said Salvation Army may hold its meetings; said share or third part and the interest thereon never to be used or invested outside of said city, but is given solely for the purpose heretofore mentioned. If said branch of the Salvation Army in said city is or should become legally organized so it may take and hold the title to property, then I direct the said trustees, or the survivor of them, to transfer said third part or share, and all the rents, income, and profit of the same, together with any other property which may come to them under any of the provisions of this will, to said organization as soon after the settlement of my estate as practicable."

On the trial, it appeared from the evidence that the Salvation Army is an unincorporated religious society having its headquarters in London, England. The officers of the organization have military titles. The head officer in England is called "general"; the subordinate officer who is head of the organization in the United States is called "commander"; a "major" has charge of a division of the country, and a "captain" has charge

of a local post or "barracks." While these officers have military titles, they perform duties similar ¹⁴³ to those of the officers in other religious denominations. Thus a commander corresponds to a bishop, a major to a presiding elder, and a captain to a minister or pastor. The barracks is the church. The property of the society in a country is held in the name of the commander in that country, and he is appointed by the general in England. The government of the society seems to be very much centralized, but not more so, perhaps, than in the case of some other religious societies or sects.

The court below held this devise void. Nearly all of the testator's property consisted of land, and as, by the terms of the will, the part of this land so devised was to be sold, and the proceeds reinvested in other land, the bequest, notwithstanding this double conversion, continued to be real estate: 3 Pomeroy's Equity Jurisprudence, sec. 1178. Then the bequest is void, unless valid as a bequest of real estate.

Section 4274, chapter 43 of the General Statutes of 1894 provides that uses and trusts are abolished, except as authorized by that chapter. It is well settled in the states from which we derived this statute that it has abolished the great body of the English law of charitable uses and trusts and the doctrine of cy-pres as administered in England: See 2 Pomeroy's Equity Jurisprudence, secs. 1018-1029. Under this statute the beneficiary of the trust must be certain, or capable of being rendered certain. Therefore no unincorporated, voluntary association, whose membership is fluctuating and uncertain, can be the cestui que trust: *Downing v. Marshall*, 23 N. Y. 366; 80 Am. Dec. 290; *Methodist Church v. Clark*, 41 Mich. 730; *Ruth v. Oberbrunner*, 40 Wis. 238. See, also, 2 Pomeroy's Equity Jurisprudence, sec. 1029, and cases cited in *Holland v. Alcock*, 108 N. Y. 312; 2 Am. St. Rep. 420. See, also, *German Land Assn. v. Scholler*, 10 Minn. 260 (331).

But there is another statute which is in *pari materia* with chapter 43, and which must be construed with it in disposing of the question here presented. Title 4, chapter 34, of the General Statutes of 1894, provides for organizing unincorporated churches into corporations. Section 3022 of this title provides: "It shall be lawful for all persons of full age, belonging to any church, congregation, or religious society not already incorporated, to assemble at the church or meeting-house, or other place where they statedly attend for divine worship, and, by a plurality vote, ¹⁴⁴ elect any number of discreet persons of

their church, congregation, or society, not less than three nor more than nine in number, as trustees to take charge of the estate and property belonging thereto, and transact all affairs relative to the temporalities thereof."

The next four sections provide the manner of giving notice of the time and place of election, the manner of conducting the election, and the manner of executing and recording the certificate of election, which, when executed and recorded, shall incorporate the congregation or society. Section 3027 then provides: "Such trustees may have a common seal, and alter the same at pleasure; they may take into their possession and custody all the temporalities of such church, congregation, or society, whether the same consists of real or personal estate, and have been given, granted, or devised, directly or indirectly, to such church, congregation, or society, or to any other person for their use."

Section 3048 further provides: "Whenever any church or religious society, now organized, or which may hereafter be organized, as a church or congregation, but not incorporated in pursuance of law, shall comply with the provisions of this title, and thereby become a body corporate, all the estate, real and personal, which has been lawfully conveyed to the said church or religious society, or to the trustees or vestry thereof in trust for the use of such church or society, whether by devise, gift, grant, purchase, or otherwise, and not lawfully disposed of, shall thereupon vest in said corporation as fully and amply as if the said church had been legally incorporated from the date of its religious organization; provided, that the name or title publicly assumed or borne by such church or society from the date of its organization as such, and none other, shall be the title by which it shall forever be known in law and as a body politic and corporate."

If the St. Paul branch of the Salvation Army sees fit to and does incorporate within a reasonable time, why will these sections not apply so as to vest the devise aforesaid in the corporation? We see no reason why. It was so held under a statute similar in its provisions to section 3027 aforesaid: See *Reformed Dutch Church v. Veeder*, 4 Wend. 494, and *Methodist Church v. Clark*, 41 Mich. 730.

We are of the opinion that the devise is void only on condition that the said branch of the Salvation Army fails to incorporate within a reasonable time, which, however, will not extend beyond the time of the hearing of the application for the

decree of distribution. ¹⁴⁵ It therefore follows that the court below erred in declaring the devise absolutely void.

In arriving at this result, we have not overlooked section 3040, which reads as follows: "All lands, tenements, and hereditaments, lawfully conveyed by devise, grant, purchase, or otherwise, to any persons as trustees, in trust for the use of any religious society organized, or which may hereafter be organized within this state, either for a meeting-house, burying-ground, or for the residence of a preacher, shall descend with the improvements in perpetual succession to, and shall be held by, such trustees in trust for such society."

We agree with the learned judge of the court below that the trustees here referred to are the trustees of the church itself, and not other persons selected by the testator as trustees of the property devised or bequeathed by him. We are also of the opinion that one of the purposes of this section was to abrogate the rule against perpetuities and the rule which prohibits restraint of alienation, so far as these rules might apply to property conveyed, devised, or bequeathed for any of the three purposes therein specified, to wit, "for a meeting-house, burying-ground, or for the residence of a preacher," and that when so vested in the corporation for any of these purposes the property may be held in "perpetual succession." This obviates the ground on which the grant was held void in *Methodist Church v. Clark*, 41 Mich. 730, and is a sufficient answer to the claim of the defendant heirs that the devise is void because it contravenes the rule against perpetuities.

Neither is the result at which we have arrived in conflict with *Little v. Willford*, 31 Minn. 173. In that case the conveyance was to certain named persons, "trustees of M. E. Church of the county of Olmsted and state of Minnesota, . . . in trust that said premises shall be kept, maintained, and disposed of as a place of divine worship for the use of the ministry and membership of the Methodist Episcopal Church in the United States of America." The conveyance was not to or for the benefit of any particular congregation or religious society, or any local subdivision of any religious society which could incorporate under the laws of this state, but was in trust for the use of the whole membership of a certain denomination in the United States. Whether or not the policy of ¹⁴⁶ the Salvation Army is such that it will permit the St. Paul branch to incorporate as a separate entity, and thereby receive this bequest, is a matter which neither the court nor anyone else but

the Salvation Army itself can determine. Under the statute the opportunity must be given to it to do so if it sees fit.

2. After making various other bequests, the will provides: "All the rest, residue, and remainder I give, devise, and bequeath to the Central Park Methodist Episcopal Church of St. Paul, Minnesota, absolutely, to be used by said church or its trustees in aiding the cause of home and foreign missions, equally."

The church is duly incorporated. The court below held this devise valid. If this devise is an absolute gift to the church it is valid, but if it is a devise in trust it is not valid, as there is no ascertained beneficiary. We are of the opinion that it is an absolute gift to the church. Sections 2 and 3, chapter 373, special Laws of 1887, provide, as to this church, as follows:

"Sec. 2. That the trustees of the society as aforesaid, in addition to the authority and power already granted by the rules and regulations of said church and the statutes, are hereby further authorized to acquire, by gift or purchase, any real property in the city of Saint Paul, necessary for mission purposes, and to sell the same when in their opinion it is for the best interest of said church.

"Sec. 3. That the said trustees aforesaid are further authorized to accept any gift, conveyance of real [estate] or other property, and to hold the same in trust for the purposes for which given, and to sell or convey the same from time to time, and to invest and dispose of the proceeds in accordance with the power and authority of the gift or trust."

A part of the general purposes for which this church is organized is missionary work, and funds given to it to be used in that work are not given in trust in the technical sense of that word. Thus, in *Atwater v. Russell*, 49 Minn. 57, 82, lands were conveyed with directions that the proceeds be used by a certain incorporated hospital "for the support of charity patients in the same." This kind of charity work was a part of the purposes for which the hospital was incorporated, and the gift was held to be absolute, and not in trust: See, also, *Bird v. Merkle*, 144 N. Y. 544; *Domestic etc. Soc. v. Gaither*, 62 Fed. Rep. 422.

¹⁴⁷ This disposes of the case. The order denying defendants' motion for a new trial is affirmed, the order denying plaintiffs' motion for a new trial is reversed, and the case is remanded to the court below, with directions to change its conclusions of law and order for judgment so that the same shall be in conformity with this opinion.

CHARITIES—DEVISE TO UNINCORPORATED SOCIETY—SUBSEQUENT INCORPORATION.—Whether an unincorporated society is a sufficiently definite or certain donee of a charity is a much controverted question: Extended note to *Bridges v. Pleasants*, 44 Am. Dec. 101. Such societies could receive charitable bequests prior to statute of 23 Henry VIII, chapter 10: *Burr v. Smith*, 7 Vt. 241; 29 Am. Dec. 154. Gifts in trust to voluntary associations for charitable purposes have been upheld, and so have gifts to churches, societies, conferences, yearly meetings of Friends, and families of Shakers, and other organizations: See monographic note to *Dashiell v. Attorney General*, 9 Am. Dec. 585. In South Carolina a church, though it is an unincorporated association, is capable of taking such a devise: *Dye v. Beaver Creek Church*, 48 S. C. 444; 59 Am. St. Rep. 724, and note. So a gift for a charity to be incorporated has been sustained: Extended note to *Bridges v. Pleasants*, 44 Am. Dec. 101. Though it has also been held that the incorporation of a voluntary association after the death of the testator does not strengthen or impair its ability to take property given it by will: *Owens v. Missionary Soc.*, 14 N. Y. 380; 67 Am. Dec. 160, and note. Charitable trusts are exhaustively discussed in the monographic notes to *Hoeffer v. Clogan*, 63 Am. St. Rep. 248-269, and *Field v. Van Wyck*, 64 Am. St. Rep. 756-772.

CHARITIES—PERPETUITIES.—The rule against perpetuities has no application in case of a trust for charitable purposes: *Mills v. Davison*, 54 N. J. Eq. 659; 55 Am. St. Rep. 594, and note; monographic note to *In re Walkerly*, 49 Am. St. Rep. 127-129, on the rule against perpetuities.

STATE v. WAGENER.

[69 MINNESOTA, 203.]

CONSTITUTION LAW—PEDDLERS.—The business of hawking or peddling is inherently moral and legitimate in itself, and the legislature can regulate it only for the purpose of preventing it from becoming a nuisance.

CONSTITUTIONAL LAW—PEDDLERS.—A statute which permits a manufacturer, farmer, or nurseryman to peddle his wares, either by himself, or his employé, without a license, but which prohibits a purchaser from such manufacturer, farmer or nurseryman from peddling the goods purchased on his own account, without a license, makes an improper classification and an arbitrary distinction, and is unconstitutional and void.

Stevens, O'Brien, Cole & Albrecht, for the relator.

H. W. Childs and G. B. Edgerton, for the respondent.

207 CANTY, J. Relator was by a justice of the peace convicted of peddling goods without a license in the town of Rose, in Ramsey county, contrary to chapter 107 of the Laws of 1897, which provides:

“Section 1. No person shall hereafter be allowed to sell or expose for sale any personal property within any organized township within the state of Minnesota, as a peddler or hawker, with-

out first obtaining a license therefor from the proper authorities of said organized township, in the manner hereinafter prescribed.

"Sec. 2. The township supervisors of every organized township in the state of Minnesota are hereby authorized and empowered to establish rates and prescribe rules for the issuing of licenses to hawkers and peddlers within the limits respectively of such organized township. The fee for such license in any organized township shall not exceed thirty (30) dollars per annum."

Section 3 provides that the town clerk may issue the license, and section 4 provides that, on conviction of peddling without a license issued as provided by the act, a fine of not less than ten dollars, or more than one hundred dollars, or imprisonment not exceeding ninety days, may be imposed.

Section 5 reads as follows:

"Sec. 5. This act shall not be construed to apply to any person ²⁰⁸ traveling from place to place, soliciting orders for goods, wares, or merchandise, with or without samples, where such goods, wares, or merchandise are to be delivered by or through a person or corporation other than the one soliciting such orders; neither shall it be construed to prevent the sale accompanied by delivery of goods, wares, or merchandise to retail dealers; nor shall it be construed to apply to train boys; nor shall it be construed to prevent any manufacturer, mechanic, nurseryman, farmer, butcher, fish or milk dealer, selling, as the case may be, his manufactured articles, or products of his nursery or farm, or his wares, as fish or milk dealer or butcher, either by himself or employee."

Relator was sentenced to imprisonment on such conviction, and sued out a writ of habeas corpus, claiming that this act is unconstitutional and void, for two reasons: 1. It contravenes sections 33 and 34 of article 4 of the constitution, prohibiting partial class legislation; and 2. It permits an excessive and unreasonable amount of money to be demanded as a license fee. We shall consider the first ground only.

We are of the opinion that the act is unconstitutional on the first ground. Section 33, aforesaid, provides: "In all cases when a general law can be made applicable, no special law shall be enacted, and, whether a general law could have been made applicable in any case, is hereby declared a judicial question, and, as such, shall be judicially determined without regard to any legislative assertion on that subject."

Section 34 provides: "The legislature shall provide general laws for the transaction of any business that may be prohibited by section 1 [section 33] of this amendment, and all such laws shall be uniform in their operation throughout the state."

This court has often held that, under these sections, the legislature must treat alike all who are in the same condition, must make the law apply to a whole class, and cannot make a law which applies only to a part of a class. And the class must be selected on some distinction, or be defined by some principle, which might naturally or properly distinguish it from all other classes.

We are of the opinion that these rules have not been complied with in the framing of this statute. It was proper to leave out of the class the persons to whom the act should apply several of the ²⁰⁰ classes of persons excepted by section 5 thereof. But other persons are excepted by section 5 who cannot be left out of the class covered by the act on any natural or proper distinction or principle. Thus, the manufacturer is allowed, by himself and his employé, to peddle without license the wares of his own manufacture. The legislature can regulate the business of hawker or peddler only for the purpose of preventing it from becoming a nuisance. The business is inherently moral and legitimate in itself, but there is in it a tendency to abuse, as many irresponsible, clamorous, and intrusive persons engage in it. It cannot be held, on any sound principle, that peddling may not become a nuisance as well when the peddler or his employer has manufactured the wares he peddles as when some one else has manufactured them. This act allows the manufacturer of brooms, tinware, patent medicine, or any other articles, whether manufactured in this state or elsewhere, to employ the most obstreperous and irrepressible peddlers to hawk his wares for him without license, while no peddler can buy the same goods from the manufacturer, and peddle them on his own account, without a license. For the purposes of a law to prevent peddling from becoming a nuisance, we cannot, on any proper basis of classification, distinguish between the peddling of goods by the manufacturer and his servant, and the peddling of the same goods by the purchaser from the manufacturer.

Thus, when the object of a law was to prohibit the nuisance arising from the emitting of dense smoke from chimneys, the law was held unconstitutional, because it excepted from the operation of the act the chimneys of manufacturing establishments: *State v. Sheriff*, 48 Minn. 236; 31 Am. St. Rep. 650. The dis-

inction was held to be arbitrary, and the classification improper.

In the same manner as the act here in question attempts to distinguish between peddling by the manufacturer and his servant, and peddling by the purchaser from such manufacturer, it attempts to distinguish between peddling by the farmer or nurseryman and peddling by the purchaser from such farmer or nurseryman; between peddling by the butcher and peddling by the purchaser from such butcher. These distinctions are arbitrary and no proper basis for classification.

²¹⁰ This disposes of the case. The act in question is unconstitutional, and the conviction under it is illegal and void.

It is ordered that the relator be, and he hereby is, discharged from custody. Let judgment be entered accordingly.

STATUTES—CONSTITUTIONALITY—PEDDLERS.—A statute making an arbitrary classification with respect to the subjects over which it operates, based upon no reason suggested by a difference in their situation or circumstances disclosing the necessity or propriety of any different legislation in respect to them, is unconstitutional: *State v. Sheriff of Ramsey Co.*, 48 Minn. 236; 31 Am. St. Rep. 650. Under the police power it is not competent for the state to prohibit a citizen from carrying on any trade, occupation, or business not injurious to the community. The business may be regulated, but not prohibited: *State v. Scougal*, 3 S. Dak. 55; 44 Am. St. Rep. 756, and note. A statute prohibiting sales of merchandise by itinerant peddlers, unless they should be licensed by designated local authorities, to whose discretion was confided the selection of proper persons to engage in such business, was held unconstitutional in *State v. Conlon*, 65 Conn. 478; 48 Am. St. Rep. 227. Compare with the principal case *Commonwealth v. Gardner*, 133 Pa. St. 284, 19 Am. St. Rep. 645, where a statute was held constitutional which forbade peddling within a certain territory within the state.

MAURIN v. LYON.

[69 MINNESOTA, 257.]

CONTRACTS—ABBREVIATIONS—PAROL EVIDENCE TO EXPLAIN.—Parol evidence is admissible to show that abbreviations, and apparently ambiguous statements of description and price contained in a contract, have a recognized meaning in the trade or business to which the contract relates, and hence that they are a sufficient statement of the terms of the contract to take it out of the operation of the statute of frauds. Such evidence neither varies nor adds to the written memorandum, but merely translates it from the language of the trade into the ordinary language of the people generally.

PARTNERSHIP—POWER OF PARTNER TO BIND FIRM. A purchase of goods by one partner in the name of the firm in quantities so large as to be entirely beyond the needs of the partnership, and for speculative purposes, though the goods be of the general character dealt in by the partnership, is beyond the scope of the partnership business and does not bind the firm, unless an

acquiescence in such act is proven, either directly or indirectly, by the usual course of dealing. Such purchase does not bind the firm, when the other members thereof repudiate the transaction as soon as it comes to their knowledge.

D. W. Bruckart, for the appellants.

G. H. Reynolds, for the respondent.

²⁵⁸ MITCHELL, J. Defendant's counterclaim is founded on an alleged purchase of five thousand bushels of wheat by the plaintiffs from the defendant's testate, Tileston. The principal points urged by the plaintiffs are: 1. That there was no sufficient memorandum of the contract of purchase to take the case out of the statute of frauds, and that parol evidence was improperly admitted to explain the terms of the written memorandum; 2. That the alleged purchase was the individual transaction of the plaintiff Marcus Maurin, and not within the scope of the partnership business.

1. The written memorandum was in the words and figures following:

"St. Cloud.

"7-6-96.

"Sold Maurin Bros.

"Cold Springs.

"5000, 1-0 July Del.

"99 c. Duluth.

"(Signed) GEO. TILESTON & CO.

"MAURIN BROS."

Both parties were engaged in buying and selling grain, and were presumably acquainted with technical terms of the trade. The referee who tried the cause admitted, over the objection and exception of the plaintiffs, parol evidence that in the trade, among buyers and sellers of wheat, the character "1-0" was used to indicate the grade of the wheat, and meant, "Grade No. 1 Northern wheat"; also, that "July Del" meant July delivery (that is, that the wheat was to be delivered during July); that "99 c. Duluth" indicated the price per bushel and the place of delivery, and meant that the price was ninety-nine cents per bushel, and the place of delivery Duluth; that these were the meanings of the characters and terms used in the ²⁵⁹ memorandum, as understood by the usages and customs of the trade among wheat men.

This evidence was competent, under the rule which admits parol evidence to show that abbreviations, and apparently am-

biguous statements of description, price, et cetera, have a recognized meaning in the trade, and hence are a sufficient statement of the terms of the contract. This is the rule as to various abbreviations and apparent ambiguities of this nature in brief notes of mercantile contracts which are often composed, to use the language of Parke, B., in *Marshall v. Lynn*, 6 Mees. & W. 109, 118, in "a sort of mercantile shorthand, made up of few and short expressions, which generally express the full meaning and intention of the parties": *Browne on the Statutes of Frauds*, sec. 380. See, also, *Paine v. Smith*, 33 Minn. 495; *Olson v. Sharpless*, 53 Minn. 91; *Merchant v. Howell*, 53 Minn. 295. The parol evidence admitted in this case neither varied nor added to the written memorandum, but merely translated it from the language of the trade into the ordinary language of people generally. The memorandum, as thus translated, fulfilled all the requirements of the statute of frauds.

2. The purchase of wheat was made by the plaintiff Marcus Maurin without the knowledge of his partner, Peter Maurin, who promptly repudiated the transaction when it came to his knowledge.

The plaintiffs had been in partnership for a number of years, engaged in conducting two general merchandise country stores—one at Cold Springs, under the personal management of Marcus, and another at Elizabeth City, under the personal management of Peter. They sold general merchandise, and bought grain and other farm products raised in the surrounding country, paying for the same in cash or merchandise, or taking it on debts. They had an elevator at each of the points where the stores were situated, and a third elevator at the station of Carlisle (which is not far from Elizabeth City), in which they stored the wheat which they purchased. This wheat they sold sometimes to millers, and sometimes through commission men at Minneapolis or Duluth, to whom they shipped it to sell for them. Sometimes they sold this wheat for future arrival.

The firm never bought any wheat at Duluth or Minneapolis, or ²⁸⁶⁰ sold any there, except the wheat which they bought in the country in the vicinity of their stores and elevators; and the understanding and agreement between the partners themselves was that their business of buying grain should be thus confined to the home markets (that is, the places where their stores and elevators were situated), and that their sales should be limited to the grain purchased at those points, and it had in fact been so limited, unless the purchase from Tileston was an exception.

Peter Maurin had, two or three years previously, made two purchases of wheat in Minneapolis on speculation, but these were made in his own individual name, and on his own personal account. The purchase from Tileston was not made to fulfill any prior contract of the firm, but, so far as appears, purely on speculation, in expectation of a future rise in price. Tileston did not have the wheat on hand at St. Cloud, where he lived, or elsewhere, but after he made the contract with Marcus Maurin he bought the wheat to fill it in Duluth. This is substantially all the evidence bearing upon the nature and scope of the partnership business.

We do not think that it justified a finding that the transaction was within the scope of the partnership business, so as to bind the firm. It by no means follows, because it was within the scope of the partnership business to buy wheat from farmers and others in the vicinity of their country elevators and stores, that it was also within the scope of the business to buy large quantities of wheat in Duluth or Minneapolis for purely speculative purposes. It has been frequently held that a purchase of goods by one partner in quantities so large as to be entirely beyond the needs of the partnership business, and for speculative purposes even though the goods be of the general character dealt in by the partnership, is beyond the scope of the partnership business, and does not bind the firm, unless an acquiescence in such act is proven, either directly or indirectly, by the usual course of dealing.

The transaction was clearly not within the scope of the partnership business, as agreed on between the partners, or as it had actually been conducted in the past. There was no evidence that Peter Maurin had ever acquiesced in any such transactions in behalf of the firm, or that the business had been so conducted as to give Tileston ²⁶¹ a right to assume that the transaction was within the scope of the partnership business. If he was not advised as to the nature or limits of that business, it was his duty to inform himself on the subject before accepting a contract made in the name of the firm. It is clear from the evidence that the partnership agreement conferred no actual authority to make the purchase in dispute. No such authority can be inferred or implied from the previous course of business of this character carried on by one partner with the knowledge of the other, for the proof furnishes no foundation for any such implication. Neither was the previous course of business such as to furnish any foundation for the claim that the transaction was within the

apparent scope of the partnership. The fourth finding of fact is, therefore, without evidence to justify it. Although the evidence and finding may establish a cause of action against Marcus Maurin individually, yet this cannot, under the statute, be set up as a counterclaim to a cause of action against the copartnership.

The order appealed from is therefore reversed, and a new trial granted.

EVIDENCE—PAROL, TO EXPLAIN TERMS OF CONTRACT.—Where phrases or terms used in a contract have acquired, by the custom of the locality or the usage of trade, a peculiar signification, parol evidence may be given to explain this, whether the words or phrases be in themselves apparently ambiguous or not: Extended notes to *Willmering v. McGaughey*, 6 Am. Rep. 678, and *Keller v. Webb*, 28 Am. Rep. 210-213. See monographic note to *Harris v. Murphy*, 56 Am. St. Rep. 680, 681.

PARTNERSHIP—POWER OF ONE PARTNER TO BIND FIRM. By virtue of the partnership relation, each partner is constituted the general agent of his copartners, and has power authorizing him to act at once as principal and agent. So long as the relation exists, he has the power to bind the partnership in all matters within the scope of partnership dealings or falling within the ordinary business and transactions of the firm: *Western Stage Co. v. Walker*, 2 Iowa, 504; 65 Am. Dec. 789, and note; *Warder v. Newdigate*, 11 B. Mon. 174; 52 Am. Dec. 567. This power extends to such matters only as, in the ordinary course of dealing, have reference to the business in which the firm is engaged: *Crosthwait v. Ross*, 1 Humph. 23; 34 Am. Dec. 613; *Savings Fund Soc. v. Savings Bank*, 36 Pa. St. 498; 78 Am. Dec. 890. Where a partnership is limited to a particular trade or business, one partner cannot bind his copartner by any contract not relating to such trade or business: *Livingston v. Roosevelt*, 4 Johns. 251; 4 Am. Dec. 273; *Western Stage Co. v. Walker*, 2 Iowa, 504; 65 Am. Dec. 789.

ROBBINS v. LARSON.

[60 MINNESOTA, 438.]

MORTGAGES — ASSIGNMENT — RECORD—NOTICE.—The record of an assignment of a mortgage is constructive notice to all persons of the rights of the assignee, as against any subsequent acts of the mortgagee affecting the mortgage, save only as excepted by statute. A second mortgagee, or the assignee of his mortgage, is not within the statutory exceptions.

MORTGAGES — ASSIGNMENT — RECORD—NOTICE TO SECOND MORTGAGEE.—A statute providing that "the recording of the assignment of a mortgage shall not, in itself, be deemed notice of such assignment to the mortgagor, his heirs or personal representatives, so as to invalidate any payment made by them, or either of them, to the mortgagee," applies only to the parties therein named, and not to a second mortgagee or his assignee.

MORTGAGES — ASSIGNMENT — NOTICE — RIGHTS OF FIRST AND SECOND MORTGAGEES.—If the assignee of a first

mortgage has had his assignment duly recorded before the execution of a second mortgage, the assignee of the latter is not entitled to have the former canceled on the ground that, subsequent to the assignment of the first mortgage, it was paid to the mortgagee without actual notice of the assignment.

Mason & Hilton, for the appellant.

Haupt & Baxter, for the respondent.

⁴³⁷ START, C. J. The facts in this case, as found by the trial court, are these: On November 8, 1888, the defendants Larson and wife executed to the defendant, the Globe Investment Company, their promissory note for twelve hundred dollars, due in five years from its date, with interest, with a mortgage on the premises described in the complaint to secure its payment. The mortgage was duly recorded on November 8, 1888; and on November 28, 1888, the Globe Investment Company, for a valuable consideration, and in the usual course of business, duly assigned this note and mortgage to the defendant Menzies. His assignment was duly recorded December 4, 1888. Afterward, and before the maturity of this note and mortgage, and on October 21, 1893, the mortgagors, Larson and wife, executed to the mortgagee, the Globe Investment Company, their other note, of like amount, due in five years, with interest, and secured its payment by a mortgage on the same premises described in the first mortgage. This second mortgage was duly recorded on November 22, 1893, and was given and received in payment of the first mortgage. The mortgagors, at the time of so paying the first note and mortgage, had no actual notice that they had been so assigned. Afterward, and on March 30, 1895, the Globe Investment Company, for a valuable consideration, duly assigned the second note and mortgage to the plaintiff, which assignment was duly recorded on October 7, 1895. Other than this, neither mortgage has ever been paid.

This action was brought to foreclose the second mortgage, and to cancel and satisfy of record the first mortgage. None of the defendants answered, except the owner of the first mortgage, Menzies. As conclusions of law, the trial court found that the plaintiff was entitled to judgment of foreclosure and sale of the premises on his ⁴³⁸ mortgage, and, further, that the first mortgage be adjudged paid, and canceled of record. The defendant Menzies moved for a new trial, and appealed from an order denying it.

The appellant claims that the finding that the second mortgage was given in payment of the first one is not sustained by the

evidence. The evidence on this fact was conflicting, and the trial court might well have found that the second mortgage was given in renewal, not in payment, of the first note and mortgage, but there was evidence sufficient to sustain the finding as made.

The only other question to be considered on this appeal is whether the facts found justified the conclusions of law that as between the plaintiff, the holder of the second mortgage, and Menzies, the owner of the first one, the first mortgage should be canceled as paid, and the second one foreclosed for the exclusive benefit of the plaintiff. The mortgagors, Larson and his wife, are not here asserting that the first mortgage has been paid, and that it ought to be canceled as to them. This litigation, then, is solely between the plaintiff and the defendant Menzies. If the latter were asserting in this action any claim against the Larsons, then the court might be called upon to adjust their respective equities; but Menzies is not seeking to foreclose his mortgage in this action, or asserting his claim, or asking any relief against them. His claim is, that as between the plaintiff and himself, the former is not equitably entitled to have the first mortgage canceled, and the second one foreclosed exclusively for the plaintiff's benefit.

A determination of this claim involves a construction of section 4183 of the General Statutes of 1894, which is in these words: "The recording of an assignment of a mortgage shall not, in itself, be deemed notice of such assignment to the mortgagor, his heirs or personal representatives, so as to invalidate any payment made by them, or either of them, to the mortgagee."

This statute is a literal copy of the New York statute on the same subject. The operation of this statute, by its terms, is limited to the mortgagor, his heirs and personal representatives. The object of the statute is manifest. It was intended to relieve the mortgagor, ⁴³⁰ his heirs, and personal representatives, from the inconvenience and expense of having to examine the records to see if any transfers of the mortgage have been made, every time they wish to make a payment of interest or principal on the mortgage. Neither the language nor the spirit of the statute justifies its application to parties not named therein. It has no application to a subsequent mortgagee or his assignee. The record of an assignment of a mortgage is constructive notice to all persons of the rights of the assignee, as against any subsequent acts of the mortgagee affecting the mortgage, save only as

excepted by the statute. A second mortgagee, or an assignee of his mortgage, is not within the statutory exceptions: Gen. Stats. 1894, sec. 4183; 1 Jones on Mortgages, 6th ed., secs. 479-482; *Viele v. Judson*, 82 N. Y. 32; *Brewster v. Carnes*, 103 N. Y. 556. The plaintiff, then, can claim no benefit from the statute, and is chargeable with notice of the assignment of the first mortgage to Menzies, and of his rights therein.

After the assignment of the first mortgage, the mortgagee, the Globe Investment Company, had in fact no authority to receive payment of it, or to discharge it, or to anything whereby the rights of the assignee could be injuriously affected; and, from the time of the recording of the assignment, all the world, including the plaintiff, and excluding the mortgagor, his heirs and personal representatives, were chargeable with notice of such fact. Therefore, when the Globe Investment Company received the second mortgage in payment of the first, it was in fact an unauthorized act; and, while the statute protects the mortgagor in making the payment, it does not change the character of the act, as to persons not within the exceptions created by the statute. Hence the second mortgage taken by the Globe Investment Company in payment of the first mortgage was not its property. It held it in trust for the assignee, and had no authority to dispose of it so as to prejudice the assignee of the first mortgage. The Globe Investment Company, if it had not assigned the second mortgage, could not have foreclosed it and secured a cancellation of the first one. Neither can the plaintiff; for he purchased his mortgage subject to the equities of Menzies, and charged with notice of them.

The trial court seems to have disposed of the case against the ⁴⁴⁰ appellant on the ground that, where one of two innocent persons must suffer by the fraud of a third person, he by whose act the third person was enabled to perpetrate the fraud must bear the loss: *Burgess v. Bragaw*, 49 Minn. 462. This rule has no application to the facts of this case. If the plaintiff suffers any loss in this case, it will not be by reason of any neglect on the part of the appellant, but by his own neglect to examine the records before purchasing the second mortgage. If he had done so, he would have been fully advised in the premises. Even if the Globe Investment Company had actually discharged the first mortgage of record, an examination of the record would have disclosed the fact that it had no authority so to do, for the reason that it did not own the mortgage.

The order denying appellant's motion for a new trial must be reversed.

So ordered.

MORTGAGES—ASSIGNMENT—EFFECT OF RECORD—SUBSEQUENT PAYMENTS BY MORTGAGOR.—A mortgagor is not chargeable with constructive notice of the record of an assignment of the mortgage: *Murphy v. Barnard*, 162 Mass. 72; 44 Am. St. Rep. 840. Actual notice of the assignment is essential to the completion of the contract relations between the assignee and the mortgagor. Until that has been given, the mortgagor does no wrong in making payments to the original mortgagee: *Foster v. Carson*, 159 Pa. St. 477; 39 Am. St. Rep. 696. But payment to, and an agreement with, a mortgagee after his assignment of the mortgage, whether for collateral security or not, cannot prejudice his assignee who has recorded the assignment, and also has the note in his possession: *Woodward v. Brown*, 119 Cal. 283; 63 Am. St. Rep. 108; *Murphy v. Barnard*, 162 Mass. 72; 44 Am. St. Rep. 340. A statute reciting that "the recording of an assignment of a mortgage shall not, of itself, be deemed notice of such assignment to the mortgagor, so as to invalidate any payment made by him to the mortgagee," does not authorize the mortgagor to pay the mortgage to one not the holder of the negotiable notes secured thereby, but it only means that the mortgagor shall not be required to search the record before making payment to the one prima facie entitled to receive it, who, in case the mortgage is accompanied by a negotiable note, is the holder thereof: *Williams v. Keyes*, 90 Mich. 290; 30 Am. St. Rep. 438, and note. Failure of the assignee to record his assignment does not postpone the lien of his mortgage to that of a mortgage made by the assignor after the date of the assignment and quitclaim, even though the subsequent mortgagee have no notice of the assignment: *Pratt v. Bennington Bank*, 10 Vt. 293; 33 Am. Dec. 201. See *Bank of Indiana v. Anderson*, 14 Iowa, 544; 83 Am. Dec. 890.

LOOMIS v. CLAMBEY.

[60 MINNESOTA, 469.]

MORTGAGES—FORECLOSURE—EXTINGUISHMENT OF LIEN.—If a mortgage given upon one tract of land to secure a debt due and payable as an entirety, is, under the power contained in the mortgage, foreclosed upon default in payment for less than the amount due, the lien of the mortgage is thereby extinguished. Under such mortgage, there can be but one foreclosure, and that exhausts the mortgage, which is no longer security for any part of the debt.

U. L. Lamprey, for the appellant.

J. P. Williams, C. E. Chapman, and Mason & Hilton, for the respondent.

⁴⁶⁹ COLLINS, J. From the allegations of the complaint herein, it appears that a mortgage was given upon a single tract of land to secure the payment of a certain promissory note.

Two years after the note matured an assignee of the mortgagee foreclosed, under the power of sale contained in the mortgage, for the full amount of the principal and interest then due and unpaid. At the foreclosure sale, such assignee bid in the land for about four hundred dollars less than was due, with the costs and expenses of foreclosure. This defendant, having succeeded to the mortgagor's interest in the land, duly made redemption from the sale; and then the assignee, who had once foreclosed the mortgage, brought this action to foreclose for the balance remaining unpaid and unsatisfied by the sale. All of the facts are fully detailed in the complaint, and an appeal is from an order overruling a general demurrer thereto.

On principle, there is no difference between this case and those of *Dick v. Moon*, 26 Minn. 309, and *Hanson v. Dunton*, 35 Minn. 189.

⁴⁷⁰ In the first mentioned of these, four notes, maturing at different periods of time, were secured by a mortgage upon a single tract of land, the mortgagee being authorized, in case of default in the payment of any of the notes, to declare the whole due. Default having been made, whereby the whole debt matured, Tourtelotte, an assignee of the mortgagee, proceeded to foreclose the mortgage under the power; but at the sale, and because of another transaction between such assignee and the mortgagee, the land was sold for enough to satisfy but two of the notes, the assignee becoming the purchaser. The land was redeemed from the sale by the owner thereof, and then an action was brought to have the mortgage adjudged a subsisting lien for the amount upon the other notes, and to foreclose the same for such amount. The court there said, page 312 (and the language is applicable here), that "under this mortgage there could be but one foreclosure—but one sale. Tourtelotte had the legal right to make that foreclosure, . . . and the foreclosure exhausted the mortgage. It was no longer security for any part of the debt."

It was also said with reference to the earlier case of *Watkins v. Hackett*, 20 Minn. 92 (106), that it was decided upon a different statute from that governing the mortgage then being considered; and, even if it had not been, that case "would not be authority for the suggestion that a mortgagee in a mortgage payable in installments might wait until the entire mortgage debt became due, and then have" more than one foreclosure.

In the second of these cases (*Hanson v. Dunton*, 35 Minn. 189, the principal of the debt was due as an entirety in five years. The

interest was payable semi-annually, with an agreement that, if the interest was not paid when due, the whole sum of money secured should become due and payable at once. Default having been made in the payment of interest, foreclosure proceedings were had under the power, and the premises sold for the full amount claimed to be due. From this sale redemption was made. Later, alleging that, by mistake in the foreclosure proceedings, certain interest actually due had been omitted in the computation, an assignee of the mortgagee brought an action to foreclose for such interest. The court held that, having treated the whole amount of principal and accrued interest as due, ⁴⁷¹ and having assumed to foreclose on that basis, the mortgagee necessarily foreclosed once for all. It was said by the court in conclusion: "Having thus made that which the mortgagor might have paid in installments payable as an entirety, the entirety became one and indivisible, and the mortgagee could not split it into two or more parcels, and foreclose first for one, and afterward for others. The first foreclosure exhausted the lien of the mortgage: *Dick v. Moon*, 26 Minn. 309, appears to cover this case completely. . . . Here the whole mortgage debt became due as an entirety, and was so treated by the mortgagee at the time of and by its foreclosure." See, also, *Fowler v. Johnson*, 26 Minn. 338.

When considering the effect of a mortgage foreclosure under a power, a sale for less than the amount claimed to be and actually due, and a redemption from the sale by the mortgagor or his successor in interest, there can be no valid distinction suggested between a mortgage given to secure the payment of a certain sum as an entirety, and foreclosed because the whole debt is due and unpaid, and a mortgage given to secure a debt payable in installments, with an agreement, acted upon in the foreclosure, that, if any installment is in default, the whole debt shall be at once mature. In either case the debt matures by agreement of the parties, and the whole is due and payable when the foreclosure proceedings are initiated. The foreclosure is for the whole debt, and not for an installment.

There is nothing in the last paragraph of the opinion in *Standish v. Vosberg*, 27 Minn. 175, which justifies a different view. It has not been quite correctly quoted by counsel for plaintiff.

Order reversed.

MORTGAGE—FORECLOSURE UNDER POWER OF SALE—EFFECT ON LIEN.—It has been laid down in general terms that when a mortgage is satisfied by a sale under it, the lien is extin-

gushed. It is also held that a foreclosure and sale for an installment due exhausts the lien of the mortgage, and the same land will not be subject to a second sale to satisfy a subsequent installment: Extended note to Bradley v. Snyder, 58 Am. Dec. 569, 571; Poweshiek Co. v. Dennison, 86 Iowa, 244; 14 Am. Rep. 521. Compare Evansville Gas-Light Co. v. State, 73 Ind. 219; 38 Am. Rep. 129, and extended note.

MYERS v. CHICAGO, ST. PAUL, MINNEAPOLIS AND OMAHA RAILWAY COMPANY.

[69 MINNESOTA, 476.]

ACTIONS—TORT—VENUE.—For the purpose of redress, it is immaterial where a tort is committed, and, the wrong being personal, the action is transitory and may be brought in the jurisdiction where the wrongdoer may be found.

ACTIONS FOR WRONGFUL DEATH—VENUE.—An action may be brought in the courts of one state for a wrongful act or omission occurring in another state by which death is caused, if the statute of the latter state gives a cause of action for such wrong.

ACTIONS—TORTS—PRESUMPTION AS TO STATUTE.—If a wrong is one for which the right of action is purely statutory, no presumption arises that such statute is in force outside of the state which enacted it.

STATUTES OF OTHER STATES—PROOF OF.—The statute law of another state is a fact that must be proved like any other fact, and, in the absence of such proof, the court must presume that the common law is in force in such other state.

STATUTES OF OTHER STATES—JUDICIAL NOTICE.—The respective states of the United States are foreign to each other so far as taking judicial notice of what the statutory laws of those states are is concerned.

STATUTES OF OTHER STATES—PLEADING AND PROOF OF.—Foreign statutory laws are usually regarded as matters of fact, and are required to be pleaded as well as proved if they constitute the foundation of the claim of defense.

JUDGMENT ON DEMURRER—WHAT CONTROLS.—Statements in the memorandum of the trial judge as to what questions were argued, submitted, and decided by him on demurrer cannot control or affect the positive language of his decision.

L. K. Luse and T. Wilson, for the appellant.

C. D. & T. D. O'Brien, for the respondent.

⁴⁷⁷ BUCK, J. Flora Myers, as administratrix of the estate of Edward Myers, deceased, brought this suit against the defendant, a railway corporation, to recover damages for its wrongful acts, which she alleges caused the death of her husband, Edward Myers, on February 14, 1896, in the state of Wisconsin. The plaintiff and her husband were at the time of his death residents of Ramsey county in the state of Minnesota, and this action was

commenced in the district court of said county, she having been duly appointed by the probate court administratrix of the estate of said Edward Myers. The deceased had no children at the time of his decease, and the plaintiff alleges that she and the estate of Edward Myers were damaged by the said wrongful acts of the defendant in the sum of five thousand dollars. The defendant was and is a railroad corporation, duly created and organized under and by virtue of the laws of the state of Minnesota, transporting passengers and freight for hire from and into the state of Wisconsin, and said line of railway, for such purpose, extends from Elroy, in said state, to the city of St. Paul, in the state of Minnesota. At and prior to his death, Edward Myers was in the employ of defendant as a brakeman, and, while so employed, he was killed by reason of the wrongful acts of the defendant. To the allegations of the complaint the defendant interposes a demurrer, upon the grounds that it appears upon the face of said complaint that it does not state facts sufficient to constitute a cause of action. The trial court overruled the demurrer, and the defendant appeals.

It is a general rule that for the purpose of redress it is immaterial where the tort was committed, and that, the wrong being personal, the action is transitory and may be brought in the jurisdiction where the wrongdoer may be found: *Tiffany on Death by Wrongful Act*, 478 sec. 195; *Herrick v. Minneapolis etc. Ry. Co.*, 31 Minn. 11; 47 Am. Rep. 771; *Dennick v. Railroad Co.*, 103 U. S. 11. Thus an action will lie in the courts of this state for a wrongful act or omission occurring out of this state, and within the bounds of another state, by which death is caused, if the statute of the latter state gives a cause of action for such wrong.

It is not necessary to determine in this action whether it is essential to the maintenance of such an action in this state that a similar statute must exist here as the one in the state creating the liability, because there is and can be no question raised as to the existence of a statute here authorizing the maintenance of an action for wrongs of the character alleged in the complaint; and, such causes of action being authorized by express statutory enactments, it cannot be claimed that the enforcement of such a cause of action, arising in another state, before the tribunals of this state, is against public policy, where the court can obtain jurisdiction of the parties. In the case of *Texas etc. Ry. Co. v. Cox*, 145 U. S. 593, it was held that a right given by the statute of one state, such as a right to sue and recover for the death of a person caused by negligence, will be recognized and enforced in

the courts of another state whose laws give a like right under the same state of facts; "and while the courts of no country execute the penal laws of another, this rule cannot be invoked as applicable to a statute which merely authorizes a civil action to recover damages for a civil injury": *The Antelope*, 10 Wheat. 66, 123, cited with approval in *Texas etc. Ry. Co. v. Cox*, 145 U. S. 593.

The next question raised is that the plaintiff failed to plead the Wisconsin statute, and thereby allege or show that the alleged wrongful acts of the defendant created a cause of action. We are of the opinion that this objection is well taken. If the wrong complained of was one for which an action might be maintained at common law, it might be presumed that it was in force where the wrongful act was committed; and if the common law was also in force in the state of the forum, no pleading or proof of the existence of the common law in the foreign state would be required or ⁴⁷⁹ necessary. "But where the wrong is one for which the right of action is purely statutory, no presumption arises that such statute is in force outside the state which enacted it": *Tiffany on Death by Wrongful Act*, sec. 195; 1 *Rice on Evidence*, sec. 41 e. And if the action is based upon the foreign law, it cannot be maintained if that law is not alleged and proved: *Hoyt v. McNeil*, 13 Minn. 362 (390); *Tiffany on Death by Wrongful Act*, sec. 195. In the case of *Hoyt v. McNeil* it is said that: "It is well settled that the courts of one state do not take judicial notice of the statutes of another state, and that, where a party relies upon the law of a foreign state, such law must be pleaded, and, so far as it is relied on, its terms must be set forth, that the court may determine whether the effect claimed for the law is legitimate": *Smith on Statutory and Constitutional Construction*, sec. 831, and authorities cited; *Pearsall v. Dwight*, 2 Mass. 84; 3 Am. Dec. 35; *Legg v. Legg*, 8 Mass. 99; *Ruggles v. Keeler*, 3 Johns. 263; 3 Am. Dec. 482.

The same doctrine was applied in *Ellis v. Maxson*, 19 Mich. 186, 2 Am. Rep. 81, where it is said: "We certainly cannot presume that the legislature of another state had adopted all of our statutes, and therefore we must have proof before we can know that they have passed any statute."

In *Robards v. Marley*, 80 Ind. 186, it was held that the statute law of a sister state is a fact that must be proved like any other fact, and, in the absence of such proof, this court presumes that the common law is in force in such state.

It is the prevailing doctrine of the state courts that the respect-

ive states of the Union are foreign to each other, so far as taking judicial notice of what the statutory laws of those states are is concerned. Such laws are usually regarded as matters of fact, and, because they are so regarded, they are required to be pleaded as well as proved, if they constitute the foundation of the claim or defense: See authorities cited in note to the case of *State v. Twitty*, 11 Am. Dec. 779.

Now while, in the absence of rebutting evidence, the foreign law will be presumed to be the common law, yet it is a reasonable rule that a party who must necessarily ignore the common law as the basis of his right of action and rely upon a statutory provision, ⁴⁸⁰ should plead and prove the foreign law under which he seeks to maintain his cause of action, as courts refuse to take judicial notice of them. The common law is so universal in most of the states of the Union that courts can readily, and, generally correctly, take judicial notice thereof; but it would be nigh impracticable to take judicial notice of all statutory foreign laws. Hence the rule seems to be quite inexorable that all statutory foreign laws must be pleaded and proven. This practice is not a great hardship or burden for the plaintiff, who seeks to recover damages on account of death by the defendant's wrongful act; for the allegation is easily made, and the proof ordinarily obtained with but little trouble and expense. At common law, no action for damages could be maintained for injuries of this kind resulting in death. The liability is purely one of statutory origin, and, where death occurs outside the state of the forum from such cause, the plaintiff must allege and prove the law upon which it is based.

We are not called upon at this time to consider what are the limitations or what the exceptions, if any, to the general rule that the statutory law of the forum will not be presumed to exist in another state, for the present case clearly comes within the rule.

We are referred to *Cooper v. Reaney*, 4 Minn. 413 (528), and *Brimhall v. Van Campen*, 8 Minn. 1 (13), 82 Am. Dec. 118, as deciding that the statute law, as well as the common law, of a sister state, will be presumed to be the same as our own.

In the first of these cases, the action was to recover the purchase price, which was long past due, of goods sold and delivered in the state of Pennsylvania. The action was on a good common-law contract, and the only question before the court was what rate of interest should be allowed as damages for its breach; and the court held that, in the absence of proof as to whether,

under the laws of Pennsylvania, such contracts would draw interest, and, if so, at what rate interest would be allowed as damages in accordance with the laws of this state. It will be observed that in such cases interest is not allowed strictly as such, or under or by virtue of the terms of the contract, but as damages for its breach. Whatever may have been said by the court, that was all that was decided in that ⁴⁸¹ case, and it falls far short of sustaining the contention of the plaintiff.

The only authority cited in *Brimhall v. Van Campen*, 8 Minn. 13, 82 Am. Dec. 118, was the prior decision of *Cooper v. Reaney*, 4 Minn. 413 (528). *Brimhall v. Van Campen*, 8 Minn. 13, 82 Am. Dec. 118, was an action on a promissory note executed on Sunday in the state of New York, which would have been invalid, and, as the court says, "contra bones mores," according to the laws of this state in force at that time. There was no proof as to the laws of New York on the subject. It is familiar doctrine that the courts of the forum will not enforce a foreign contract which is against the policy of its laws or against good morals, although it was valid in the state or country where it was executed. Whether a contract executed on Sunday in another state would fully come within that rule may be an open question. But, even if it does not, it may be that courts would refuse to indulge in any presumption whatever as to the *lex loci contractus*, either statute or common, for the purpose of upholding and enforcing a contract which is illegal or against good morals within the law of the forum. The case may have been decided upon some such ground, but, in so far as the opinion assumes to lay down the general rule that the statute law of the place of the contract will, in the absence of proof, be presumed to be the same as that of the forum, it is not good law, and was long since substantially overruled in *Hoyt v. McNeil*, 13 Minn. 362 (390), although not therein alluded to.

The question of whether the plaintiff can maintain this action in the capacity in which she brings it, and as to who is entitled to the damages in case of recovery, is not properly before us, as these matters depend upon the provisions of the statute of Wisconsin upon the subject; and, as the statute of that state thereon, if any, is not pleaded, we have no facts upon which to base an opinion. But, with a view to future proceedings in this action, we may add that, assuming the statute of the state of Wisconsin to be similar to our own, the plaintiff, who was appointed in the domicile of the deceased, which is the place of the principal administration, may maintain this action in the courts of this state.

In this connection, it may be well to refer to the contention of the learned counsel for the respondent, that it appears from the memorandum ⁴⁸² of the trial judge that the failure to plead the Wisconsin statute was not argued or presented or ruled upon by the trial court, and hence should not be considered upon this appeal. But the demurrer went to the entire complaint, upon the ground that it appeared upon the face thereof that it did not state facts sufficient to constitute a cause of action. It was a general demurrer, which raised an objection to the entire complaint, without specifying any particular cause or defect, and it was sufficient to reach this substantial omission to plead the statute of Wisconsin, if any such exists, warranting the bringing of this action.

The order overruling the demurrer was also a general one, and must be deemed to have been intended to cover all defects in the complaint, notwithstanding the statement in the memorandum of the trial court that it did not decide the question of whether plaintiff should have pleaded the statute of the state of Wisconsin. The order overruling the demurrer must be taken with all the force and effect which its language implies, uncontrolled by the memorandum of the trial court.

Our conclusion is that the order overruling the demurrer must be reversed.

So ordered.

ACTIONS—TRANSITORY—PERSONAL INJURIES.—An action to recover for injuries to the person of the plaintiff is transitory, and the courts of this state have jurisdiction over it if the defendant is served with process therein, though both parties reside in another state where the cause of action arose: *Eingartner v. Illinois Steel Co.*, 94 Wis. 70; 59 Am. St. Rep. 859, and monographic note; monographic note to *Morris v. Missouri Pac. Ry. Co.*, 22 Am. St. Rep. 24; *Burdick v. Missouri Pac. Ry. Co.*, 123 Mo. 221; 45 Am. St. Rep. 528.

EVIDENCE—LAWS OF OTHER STATES—PRESUMPTION.—Statutes of another state must be pleaded and proved as any other fact. The courts will not take judicial notice of them: *Schultz v. Howard*, 63 Minn. 196; 56 Am. St. Rep. 470, and note; *Hancock Nat. Bank v. Ellis*, 166 Mass. 414; 55 Am. St. Rep. 414, and note. It is presumed that the common law prevails in a sister state: *Burdick v. Missouri Pac. Ry. Co.*, 123 Mo. 221; 45 Am. St. Rep. 528; unless the contrary is shown: *Carpenter v. Grand Trunk Ry. Co.*, 72 Me. 388; 39 Am. Rep. 340; *Connor v. Trawick*, 37 Ala. 289; 79 Am. Dec. 58. This presumption has been held to arise only when states have a common origin, or are populated by citizens coming from states having a common origin: *Peet v. Hatcher*, 112 Ala. 514; 57 Am. St. Rep. 45; *St. Sure v. Lindsfelt*, 82 Wis. 346; 33 Am. St. Rep. 50.

HOLDEN v. GREAT WESTERN ELEVATOR COMPANY.

[69 MINNESOTA, 527.]

ACTIONS AGAINST CORPORATIONS—PLEADING—CORPORATE EXISTENCE—DEMURRER.—Failure to allege the corporate existence in an action against a corporation cannot be taken advantage of by general demurrer.

CORPORATIONS—ACTIONS BY OR AGAINST—PLEADING CORPORATE EXISTENCE.—In an action by or against a corporation, it is unnecessary to aver its corporate existence, except in cases where the action, in its gist or substance, involves the fact of corporate existence, in which case it must be alleged the same as any other fact constituting the cause of action.

J. A. Dalzell, and Koon, Whelan & Bennett, for the appellant.

Baldwin & Patterson, and E. E. Harriott, for the respondent.

⁵²⁸ MITCHELL, J. This action was brought to recover damages for the wrongful conversion of the personal property of the plaintiff by the defendant. The title of the action was "J. H. Holden, Plaintiff, against Great Western Elevator Company, a Corporation, Defendant," but there was no allegation in the complaint that the defendant was a corporation. The defendant appeared by the name by which it was sued, and demurred to the complaint on the ground that it did not state ⁵²⁹ facts sufficient to constitute a cause of action. From an order overruling the demurrer, the defendant appealed.

The particular objection urged against the complaint is that it contained no allegation that the defendant was a corporation. We have, then, the anomaly of the defendant appearing by the name by which it was sued, thereby admitting that it is an entity of some kind capable of appearing as a party to an action, and objecting to the complaint because it does not state what kind of an entity it is. And even if it is necessary, in an action against a corporation, to allege its corporate existence, it would seem to be illogical to hold that the omission to do so could be taken advantage of by general demurrer.

But, waiving this question, we are of opinion that in an action by or against a corporation it is unnecessary to aver the incorporation, except in cases where the action, in its gist or substance, involves the fact of corporate existence, in which case, of course, it would have to be alleged the same as any other fact constituting the cause of action. The decisions on this question are conflicting, sometimes in the same jurisdiction. Our own decisions are not entirely free from this criticism. But, in our judgment, the doctrine just stated is sound on principle, and supported by

the weight of authority. No averment of incorporation was required at common law, and we have no statute requiring it. When an action is brought by or against a corporation, there is no more reason, in the nature of things, why it should be necessary to allege that it is an artificial person than there is in an action by or against a natural person to allege that he is such. It is not a fact which enters into or constitutes any part of the cause of action. We strongly intimated in *Howland v. Jeuel*, 55 Minn. 102, that such were our views of the law, which are in accord with those expressed by Mr. Freeman in his notes to *Harris v. Muskingum Mfg. Co.*, 29 Am. Dec. 375, and to *Miller v. Pine Min. Co.*, 2 Idaho, 1206, 35 Am. St. Rep. 291, in which we fully concur.

Order affirmed.

CORPORATIONS—ACTIONS AGAINST—PLEADING CORPORATE EXISTENCE.—The decided weight of authority sustains the proposition that in an action by or against a corporation in which it is designated by a corporate name, there is no necessity of alleging the creation or existence of the corporation: Extended note to *Miller v. Pine Mining Co.*, 35 Am. St. Rep. 291. If it is sued by its corporate name, this will be sufficient, and the declaration will not be demurrable for want of allegations of greater certainty as to corporate existence: Extended note to *Harris v. Muskingum Mfg. Co.*, 29 Am. Dec. 375. Compare *Citizen's Bank v. Corkings*, 9 S. Dak. 614; 62 Am. St. Rep. 891.

CASES
IN THE
SUPREME COURT
OF
MISSISSIPPI.

LOWRY v. INSURANCE CO. OF NORTH AMERICA.

[75 MISSISSIPPI, 43.]

INSURANCE.—AN ACTION BY A MORTGAGEE may be maintained on a policy of insurance issued to and in the name of the mortgagor, providing that the loss shall be payable to the mortgagee as his interest may appear, where the amount of the debt secured by the mortgage exceeds the amount of the insurance and the whole value of the property.

Action by mortgagees upon a policy of insurance against fire issued to the mortgagor, but made payable to the mortgagees as their interest might appear. A demurrer to the complaint was sustained in the trial court, and the plaintiffs thereupon appealed.

Fewell & Brahan, for the appellant.

Miller & Baskin, for the appellee.

44 **WHITFIELD, J.** The precise question presented by this record is this: When the owner of real and personal property mortgages it to a lender of money for a loan, and then insures the said property in his own name, the contract of insurance providing that the loss shall be payable to such mortgagee as his interest may appear, ⁴⁵ and the amount of the mortgage debt exceeds both the whole amount of such insurance and the whole value of said property, can the mortgagee, in such case, the property being destroyed by fire, maintain an action at law, in his own name alone, on such policy? That he can is clear on principle, and thoroughly established by the decided weight of authority: See, as putting the matter at rest, the authorities cited in the exhaustive note to *Chipman v. Carroll*, 53 Kan. 163; 25 L. R. Ann. 305; *Motley v. Manufacturers' Ins. Co.*, 29 Me. 337; 50 Am.

Dec. 591; *Maxcy v. New Hampshire Fire Ins. Co.*, 54 Minn. 272; 40 Am. St. Rep. 325; 2 Wood on Fire Insurance, 112; 2 May on Insurance, 3d ed., sec. 449, p. 1014; Ostrander's Fire Insurance, sec. 282, p. 602; *Pitney v. Glens Falls Ins. Co.*, 65 N. Y. 6; and compare *Georgia Home Ins. Co. v. Stein*, 72 Miss. 945, 950.

Cases cited by learned counsel for appellee are not in point, except *Williamson v. Michigan Fire etc. Ins. Co.*, 86 Wis. 393; 39 Am. St. Rep. 906. This case cites *Hodgson v. German Ins. Co.*, 86 Wis. 323, but in that case the mortgage debt "was considerably less than the amount of insurance." It also cites *Chandos v. American Fire Ins. Co.*, 84 Wis. 184, the unsoundness of which case is demonstrated in the note to it in 19 L. R. Ann. 321, where "the peculiar mistakes" of the opinion in that case are severely criticised. It also cites 2 Wood on Insurance, 1122, where that author, on page 1124, expressly says: "But where the interest of the payee covers the whole loss, he may sue in his own name." It also cites *Martin v. Franklin Fire Ins. Co.*, 38 N. J. L. 140. But, as is shown in note to *Chipman v. Carroll*, 25 L. R. Ann. 308, that case holds that either mortgagor or mortgagee may sue. *Fire Ins. Co. v. Felrath*, 77 Ala. 194, 54 Am. Rep. 58, is a case where the insurance was for fifteen hundred and fifty dollars, and the mortgage for ten hundred and eighty dollars, and the opinion goes on the ground that to allow the mortgagee to sue in such case alone would be to "split one contract into two causes of action," and that the provision, in such case, is a mere appointment of a payee of part of the money.

⁴⁶ But this very case is cited in May on Insurance, volume 2, section 449, page 1014, note 7, where it is shown that the holding was because the mortgage debt was less than the amount of the insurance. It is also distinguished in the note to *Chipman v. Carroll*, 25 L. R. Ann. 308, though it should be there stated, not that "the mortgage did not cover all the property insured," but that the mortgage debt was less than the amount of the insurance. But, finally, the court, in *Fire Ins. Co. v. Felrath*, 77 Ala. 199, 54 Am. Rep. 58, itself says: "In some of these cases [holding that the mortgagee can sue alone] the appointee's claim equaled or exceeded the whole sum insured, which, of course, involved no splitting up of the cause of action. This distinguishes such cases from this."

Another case cited by learned counsel for appellee is *Grosvenor v. Atlantic Fire Ins. Co.*, 17 N. Y. 391, decided in 1858. This case overrules two earlier cases, and three judges dissented, and, besides, it is distinguished in *Pitney v. Glens Falls Ins. Co.*, 65

N. Y. 6, on the ground that in Grosvenor's case the policy did not have the clause, "as the mortgagee's interest may appear." It is in clear conflict with this last case.

Indeed, some courts hold that in a case like the one before us, the mortgagee cannot maintain an action when it does not appear that the mortgage debt is still unpaid: *Westchester Fire Ins. Co. v. Coverdale*, 48 Kan. 446. And Mr. May so lays down the law (2 May on Insurance, 3d ed., sec. 449, p. 1014), as does the supreme court of Minnesota, in *Maxcy v. New Hampshire Fire Ins. Co.*, 54 Minn. 276, 40 Am. St. Rep. 325. See, also, *Phoenix Ins. Co. v. Omaha Loan etc. Co.*, 41 Neb. 834. As to this we decide nothing now.

A large part of the argument of counsel for appellee in this brief is a mere adoption of the opinion of Judge Orton in *Hammel v. Queen Ins. Co.*, 50 Wis. 240 (cited in *Ostrander's Fire Insurance*, 597, 598) but, unfortunately for counsel, it is the dissenting opinion.

The judgment is reversed, the demurrer overruled, and the cause remanded.

INSURANCE—SUIT BY MORTGAGEE UPON POLICY.—If a policy of insurance against loss by fire is issued to an owner of real property, payable in case of loss to a designated mortgagee as his interest may appear, he is entitled to maintain in his own name an action upon the policy without joining his mortgagor, whether the amount of the loss is greater or less than the sum due upon the mortgage, but the mortgagor can sue for the whole loss, if the mortgagee consents: *Palmer Sav. Bank v. Insurance Co. of N. A.*, 166 Mass. 189; 55 Am. St. Rep. 387; *Maxcy v. New Hampshire etc. Ins. Co.*, 54 Minn. 272; 40 Am. St. Rep. 325, and note.

SUPREME LODGE KNIGHTS OF PYTHIAS v. STEIN.

[75 MISSISSIPPI, 107.]

BENEFICIAL ASSOCIATIONS—LEGISLATIVE POWERS—DELEGATION OF.—The supreme lodge of a beneficial association, such as the Knights of Pythias, cannot delegate to a subordinate managing committee the legislative power vested by the charter in the supreme lodge alone. Hence, a by-law or regulation adopted by such committee undertaking to forfeit a member's rights in the event of his suicide is inoperative.

BENEFICIAL ASSOCIATIONS—CONDITIONS IN APPLICATIONS FOR, AND IN A CERTIFICATE OF, INSURANCE, WHEN NOT BINDING.—If a member of a beneficial association is entitled to a certificate insuring his life, and a committee of the association, without authority, enacts a by-law imposing a condition against suicide, and he, in his application, assents to this condition, and the certificate purports to be subject thereto, he is not bound by the condition, because it was imposed without authority.

BENEFICIAL ASSOCIATIONS.—A CONDITION ADOPTED BY A BENEFICIAL ASSOCIATION AFTER issuing a certificate of insurance cannot affect rights of the holder of such certificate.

BENEFICIAL ASSOCIATIONS.—THE CHARTER OF A BENEFICIAL ASSOCIATION is as much a part of the contract of insurance made by it as if written therein.

Action by Rozalie Stein to recover five thousand dollars on a benefit certificate issued by the defendant lodge to her husband on the twenty-third day of January, 1893. The certificate purported to be subject to the terms and conditions of the application, and the application provided that the lodge should not be liable in the event of the member's death by suicide. This condition was inserted pursuant to a by-law adopted by the board of control about ten days prior to the issuing of the policy. Judgment was rendered by the trial court against the defendant lodge, and it thereupon appealed.

Nugent & McWillie, for the appellant.

Rush & Gardner, and Mayes & Harris, for the appellee.

117 **WHITFIELD, J.** We held, in *Kramer v. Supreme Lodge*, at the last spring term of this court (no opinions filed), that the supreme lodge could not delegate to a subordinate managing committee—the board of control—the legislative power vested by the charter in the supreme lodge alone, approving *Supreme Lodge K. of P. v. La Malta*, 95 Tenn. 157, in that regard, to which case we also refer for the history of the organization and development of the order of the Knights of Pythias. The anti-suicide clause in this case was adopted by the board of control, in Chicago, January 12 and 13, 1893; but it was never, before Stein's death, published in the official journal of the supreme lodge, or adopted, ratified, or enacted by the supreme lodge. It follows that the regulation against suicide, if considered as a by-law, is void, because the board of control, a mere ministerial committee, vested with administrative functions in relation to the endowment rank, had no power to pass a law like this, fundamental in its character, providing a new condition avoiding absolutely the benefit certificate of one who should commit suicide.

But, assenting to this view, as already established by the two cases (*Kramer v. Supreme Lodge* and *Hughes v. Supreme Lodge*), it is insisted that, if the anti-suicide provision be void as a by-law, it is a valid element of a contract manifested by the application and the benefit certificate, and that, Stein having

signed an application which bound him to the observance of all laws then in existence, or thereafter to be passed by the supreme lodge or the board of control, and this application containing this anti-suicide clause, he is bound by it, as an integral and inseparable element of an indivisible contract. To a proper understanding of the case in its view, it will be well to set out the facts of the case. In June, 1892, Stein, being then a Knight of Pythias, and, as such knight, entitled to insurance in the endowment rank, upon compliance with the provisions of the charter (act of Congress, May 5, 1870, as amended 1882), ¹¹⁸ and valid rules passed in accordance therewith, was admitted to the endowment rank, and received a benefit certificate for three thousand dollars. No anti-suicide clause was at that time in his application, or known to the order. The supreme lodge, at its seventeenth session, held in Kansas City, Missouri, August 23 to September 3, 1892, adopted and promulgated the constitution of the "Endowment Rank of the Knights of Pythias of the World," under sections 5 and 6 of article 2 of which constitution this knight, Stein, was entitled to receive a benefit certificate of five thousand dollars upon compliance with the provisions of the charter, and valid regulations passed in pursuance of it. No anti-suicide provision was in that constitution adopted by the supreme lodge, or even up to Stein's death, in August, 1893; but on January 12 and 13, 1893, the board of control—a mere managing committee, without authority—adopted such provision. On January 20, 1893—seven or eight days only thereafter, and when this provision had not been published, as required by article 14 of the constitution of the supreme lodge itself—Stein applied for the increased insurance, and signed the application herein, and received the benefit certificate herein for five thousand dollars, surrendering his previous certificate for three thousand dollars, the application and certificate having been prepared in accordance with this anti-suicide clause, adopted just seven or eight days before, illegally; and thereafter, in August, 1893, Stein committed suicide, the supreme lodge having never, up to that date, adopted the anti-suicide provision. These being the facts, the exact question on this branch of the case for decision is: What was the contract in this case? "The conclusion," says Mr. Bacon (1 Bacon on Benefit Societies, sec. 161), "from an examination of all the cases is, that the contract is found in the certificate, if one is issued, but is to be construed and governed by the charter and by-laws of the society, and the statutes of the state of the domicile of the corporation." See,

also, 1 Bacon on Benefit Societies, secs. 48, 91 a. The contracting parties here are Stein and the supreme lodge, not the board of control; and, so far as the supreme ¹¹⁹ lodge is concerned, it had never assented to this anti-suicide clause up to the time of Stein's death. It is essential to a contract that both parties shall agree to the same thing. The case so much relied on by appellant—McCoy v. Northwestern Mut. Relief Assn., 92 Wis. 577—is not in point. The association is not the same, and in that case the anti-suicide provision was adopted by the association itself, in accordance with its charter, on January 15, 1890, McCoy having been actually notified twice before it was adopted, and not having died till some two years after its due adoption. So Daughtry v. Knights of Pythias, 48 La. Ann. 1203, 55 Am. St. Rep. 310, was a case where the by-law was conceded to have been validly enacted—"approved by the supreme lodge," says the court. In Hoffmeyer v. Muench (1894), 59 Mo. App. 20, the charter of the order did not require the beneficiary to be one dependent upon the assured; but a local lodge of the order adopted a constitution, according to section 7, of which the beneficiary had to be one so dependent. The court held that section 7 was void in that view, saying: "The contract is made with the corporation, and not with the subordinate lodge, and it is not for the subordinate lodge to say what contracts the corporation may make": Citing Bacon's Benefit Societies, sec. 144.

In Knights Templar etc. Co. v. Berry, 4 U. S. App. 353, 1 C. C. A. 501, 50 Fed. Rep. 511, the policy contained this anti-suicide provision when signed by Berry, and was the only policy he ever had. A statute of Missouri prohibited this defense, unless the assured contemplated suicide when he applied for the policy. Berry committed suicide, and the defense was this clause, the company conceding, however, that it was bound to pay back the premiums. The suit was on this policy, and the defense disallowed, as a by-law or as a contract.

It will be noticed that here not even the premiums are offered to be returned, and the forfeiture of the three thousand dollars as well as of the five thousand dollars is insisted on, although section 7 of article 2 of the ¹²⁰ constitution of the endowment rank required premiums paid to be refunded. To the same effect with the case just cited are Aetna Life Ins. Co. v. Florida, 32 U. S. App. 753, 16 C. C. A. 618, 69 Fed. Rep. 932, and Hale v. Equitable Aid Union, 168 Pa. St. 377, in which the assured agreed in his application to be bound by all rules and regulations then existing or thereafter adopted by the union, and it after-

ward adopted a regulation changing the amount the beneficiary was to receive from one-half to one-tenth of the amount. Though adopted by the union itself, it was held that it would not affect the policy issued before its adoption: See, generally, 1 Bacon on Benefit Societies, *passim*. See, specially, 1 Bacon on Benefit Societies, sec. 92, and *Wist v. Grand Lodge A. O. U. W.*, 22 Or. 271; 29 Am. St. Rep. 603.

The charter is as much a part of this contract as if written on its face. That charter prohibited any person but the supreme lodge from passing this regulation against suicide. That charter is the law of this contract, and the anti-suicide clause must be regarded as written out of the contract by the charter. The suits in the cases just cited were, just as here, on the policy with this clause in them, and they, properly analyzed, are a distinct holding that neither as a by-law nor as a contract can this provision be upheld. What was validly agreed on in accordance with the charter constitutes the contract in those cases and in this. The objection that this view destroys the board of control and the endowment rank is fanciful, not real. The board, as an organization, remains. All the administrative functions properly conferred on it remain. Our holding merely denies it what the charter denied it—the power to pass laws, fundamental in their nature, governing the endowment rank, which was vested by the charter in the supreme lodge alone. It is easy for the supreme lodge to enact such provision, and, when validly enacted by it, there can be no objection to its enforcement. But it was clearly not in the power of this board of control—a mere ministerial administrative committee—to usurp to itself the legislative authority granted to the supreme lodge ¹²¹ as the sole source of such authority, and insert this provision illegally in this application, and force it upon Stein, already a knight, and a member of the endowment rank.

Affirmed.

MUTUAL BENEFIT SOCIETIES—LEGISLATIVE POWERS—DELEGATION OF.—The supreme lodge of a mutual benefit society has no authority, where the sole power to legislate with respect to the endowment rank of such society is vested in the association by its charter, to pass a general law against suicide, affecting the entire endowment rank: See monographic note to *Lake v. Minnesota etc. Assn.*, 52 Am. St. Rep. 557.

MUTUAL BENEFIT SOCIETIES—CHANGE OF BY-LAWS.—If a mutual benefit society issues to a member a certificate of insurance, it cannot, by the subsequent adoption of a by-law, modify or change the contract without the consent of the member: *Starling v. Supreme Council*, 108 Mich. 440; 62 Am. St. Rep. 709. See mono-

graphic note to *Lake v. Minnesota etc. Assn.*, 52 Am. St. Rep. 556, 557.

MUTUAL BENEFIT SOCIETIES.—THE CONTRACT OF INSURANCE between a mutual benefit society and one of its members is made up of the application for membership, the certificate issued, and the charter, constitution, and by-laws of the order: See monographic note to *Lake v. Minnesota etc. Assn.*, 52 Am. St. Rep. 559; *Sourwine v. Supreme Lodge K. of P.*, 12 Ind. App. 447; 54 Am. St. Rep. 532, and note.

WEIS v. AARON.

[75 MISSISSIPPI, 133.]

A JUDGMENT IS AN ENTIRETY, and if void as to one of the defendants is void as to all, as where one of the defendants is dead when it was rendered. This rule is not abrogated by a statute declaring that one of several appellants shall not secure a reversal as to himself by assigning some error in a judgment valid as to him, which judgment does not affect his rights, but does constitute reversible error as to the other appellants.

A JUDGMENT AGAINST A PERSON DEAD AT THE TIME OF ITS RENDITION is void, and is therefore subject to collateral assault.

Trial of a claim to certain property alleged to belong to Herman Aaron, who was not a party to the judgment or execution under which it had been seized. This judgment was one in replevin against Basket & Aaron, as principals, and one Upshur, as surety, the latter having died prior to its rendition. It was held to be void by the trial court, and the plaintiffs appealed.

F. F. Noel, for the appellant.

Rush & Gardner, for the appellee.

¹³⁹ **WHITFIELD, J.** The judgment was in replevin against the principals, Basket & Aaron, and Upshur, the surety on the replevin bond. Such ¹⁴⁰ surety is "a party to the litigation by operation of law": *Spratley v. Kitchens*, 55 Miss. 581; 1 Freeman on Judgments, sec. 176. The surety was dead when the judgment was rendered, yet judgment was rendered against the principals and surety. The judgment was an entirety, and was absolutely void: *Parisot v. Green*, 46 Miss. 750; *Dyson v. Baker*, 54 Miss. 28; *Hall v. Williams*, 6 Pick. 246; *Covenant etc. Ins. Co. v. Clover*, 36 Mo. 392. In this last case, Moneter and Clover were sued, but Moneter was not served, and the court said: "It is insisted that the judgment is good against Clover, and that he cannot take advantage of the defect as to his codefendant, because it does not affect him. But this is a judgment at law—

an entirety. It is good as to all, or bad as to all; and an entire judgment against several defendants will be reversed as to all if it be erroneous as to one."

Counsel for appellee rely upon section 4378 of the Code of 1892 (Code 1880, sec. 1440), as an answer to this well-settled rule. But this rule of practice was not meant to announce that a judgment at law against several, absolutely void because one was dead when the judgment was rendered, is valid as to the living parties, and that they cannot, therefore, on appeal, show it was wholly void, being an entirety. It simply declares that one of several appellants shall not secure a reversal of the judgment as to himself, by assigning some error in the judgment valid as to him, which error does not affect his rights, which, however, constitutes reversible error as to other appellants. The statute has no application in a case where the judgment below is for any reason absolutely void as to all the defendants, but applies when the matter which would reverse it as to one may not do so as to others, such matter being mere error in the judgment, and not going to the power of the court to render any judgment in the particular state of case. But here the error in the judgment made it void as to Basket & Aaron as well as to Upshur, and did affect the rights of Basket & Aaron. When the action of the court below results in merely reversible error as ¹⁴¹ to one of the parties, the other cannot assign here that error; but when the action of the court below is absolutely void as to all, the statute does not apply.

The cases in which this statute applies are illustrated in *Terry v. Curd etc. Mfg. Co.*, 66 Miss. 398, and *Burks v. Burks*, 66 Miss. 494. The authorities cited by learned counsel for appellants, from 12 American and English Encyclopedia of Law, 147 n, are cases holding that a judgment against one person, dead at the time, is voidable and not void; and some of these cases rest, apparently, upon the proposition that such a judgment (in attachment against land, or in ejectment, being proceedings in rem in one view), is merely irregular. Whatever may be the better view on principle (see 1 Freeman on Judgments, sec. 153, holding such judgments to be irregular only), it is the settled law in this state that such a judgment is absolutely void: See the Mississippi cases in note 5 to said section 153, page 275. And a void judgment may be collaterally assailed. The execution was not authorized by section 3461 of the code of 1892, for that refers to cases where one of the defendants dies after judgment, nor by section 3729. The execution was not levied on the thir-

teen bales of cotton, which are not shown to have been disposed of, except by inference to be drawn from the fact of the sale of Basket & Aaron's business to Herman Aaron. The purpose of section 3729 is to have the sheriff, in a case in the attitude of the one at bar, secure the specific property, if to be had, and only if that cannot be done, to make the money: *Compare Place v. Riley*, 98 N. Y. 4, 5. It is not a case of variance between the judgment and execution, but of failure to follow the statute based on the purpose of securing to the successful party, if to be had, in an action of replevin, the specific property. The voidness of the judgment, however, is decisive.

Affirmed.

JUDGMENT AS AN ENTIRETY.—The plaintiff who sues on a joint judgment must recover against all the defendants or none, for the judgment is an entirety, and a defense good for one is good for all: *Watson v. Steinau*, 19 R. I. 218; 61 Am. St. Rep. 768, and note. A judgment rendered against three defendants, when two only were served with summons, is void as against all of them: *Hulme v. Janes*, 6 Tex. 242; 55 Am. Dec. 774; *Martin v. Williams*, 42 Miss. 210; 97 Am. Dec. 456. A judgment against several defendants, one of whom is dead at the time it is rendered, is a unit as to all the defendants, and hence, on a proper motion being made therefor, must be vacated as to all: *Clafin v. Dunne*, 129 Ill. 241; 16 Am. St. Rep. 263.

JUDGMENTS AGAINST DECEASED PERSONS.—Although there is some conflict in the cases, the great weight of American authority sustains the proposition that where a court has obtained jurisdiction of the parties and of the subject matter during the lifetime of the parties to the suit, a judgment rendered for or against one of them after his death, although erroneous and liable to be set aside by proper direct proceedings, is simply voidable, and not void nor subject to collateral attack: See monographic note to *Watt v. Brookover*, 29 Am. St. Rep. 816, on judgments for or against deceased persons.

CARSON v. VICKSBURG BANK.

[75 MISSISSIPPI, 167.]

BENEFICIAL ASSOCIATIONS—CERTIFICATE IS PAYABLE ONLY TO BENEFICIARIES PROVIDED BY THE CHARTER OF THE ASSOCIATION.—If the charter of a beneficial association provides that an applicant for membership shall designate some person related to, or dependent upon, him for support, to whom the benefit shall be paid, that the amount of the benefit shall be held sacred as a legacy for the persons so named, and shall under no circumstances be appropriated to the payment of debts of the deceased member, and that if none of the designated beneficiaries shall be alive on the decease of the member, the benefit shall be paid to his heirs, and if there are none, the liability of the association shall cease and determine, a certificate cannot be pledged as collateral security for the payment of the member's debts, and if he causes his certificate to be surrendered, and designates a new

beneficiary for the purposes of having him apply the proceeds to the payment of such debts, he will hold the proceeds of the certificate as a trustee for the widow and children of the deceased member.

BENEFICIAL ASSOCIATIONS—CHANGE IN BENEFICIARY.—The right of a person designated as beneficiary in a certificate of membership depends on his continuance as such until the death of the member. Before that time the member may change the beneficiary, and thereby defeat his rights.

Miller, Smith & Hirsch, for the appellant.

Dadney & McCabe, and Shelton & Brunini, for the appellees.

¹⁷⁰ **TERRAL, J.** This is a contest between the Vicksburg Bank, as complainant, and Mary A. Carson, respondent and cross-complainant, as to the application of the proceeds of a certificate of membership in section 34 of the endowment rank of the Knights of Pythias at Vicksburg, paid into court by the board of control of the supreme lodge of said order.

¹⁷¹ It appears from the pleading and evidence in the case that John C. Carson was, on the twelfth day of November, 1890, admitted to membership in section 34, Knights of Pythias, and a certificate thereof, in the sum of three thousand dollars, payable to Mary A. Carson, was issued to him; that said John C. Carson, having become indebted to John F. Halpin Company, an incorporated mercantile company, in a sum of money, largely exceeding three thousand dollars, and for the purpose of securing said John F. Halpin Company its said debt, did, on the ninth day of May, 1891, at the request of said John F. Halpin Company, cause a change to be made in the beneficiary of his said certificate of membership, whereby J. K. Bruzelius was substituted for Mary A. Carson; that said Bruzelius was not intended to be the real beneficiary in the certificate, but was so named that the John F. Halpin Company might become the real beneficiary therein; that said Carson delivered said certificate of membership to John F. Halpin Company as collateral security for the debt due it by him; that the Vicksburg bank, by assignment, has become entitled to all the interest in and right to said endowment certificate as fully as the same was vested in John F. Halpin Company; that the John F. Halpin Company, from the time of the assignment to it as collateral security of said certificate of membership, paid to the Knights of Pythias all the dues and assessments of said John C. Carson up to the date of his death; and that John C. Carson died in the month of January, 1893, a member in good standing in said benevolent society.

It further appears that the defendant corporation denied any knowledge of the purpose of Carson in changing the beneficiary from Mary Carson to Bruzelius, and there is no evidence that it had any notice or information of such purpose, though, perhaps, Maganus, the secretary of section 34, endowment rank, had good reason to believe that it was done for the purpose of making Bruzelius the nominal beneficiary, and for the purpose of passing it to the John F. Halpin Company, as collateral security. The three thousand dollars endowment was ready to be paid ¹⁷² by the defendant company, and by agreement of the parties was placed in the Vicksburg Bank, to abide the result of this suit.

In accordance with the act of Congress, entitled, "An act to provide for the creation of corporations in the District of Columbia by general law," approved May 5, 1870, Joseph T. K. Plant, and six others, filed in the office of register of deeds, in the District of Columbia, a certificate of association, to incorporate themselves and their associates as a benefit society, under the name of "The Supreme Lodge of the Knights of Pythias of the World." The charter and constitution of said association is incorporated in the record of this case, and at the time Carson was admitted a member, that part of the constitution which is material to this case is set out below, but at the time of the death of Carson that part of it between brackets had been repealed and annulled.

"Article XII.—Beneficiaries. Sec. 1. Each applicant for membership in the endowment rank shall designate in his application some person or persons related to, or dependent upon, him for support, as hereinafter provided, to whom the benefit shall be paid when due; and the name or names and the relationship of the person or persons so designated shall be inserted in the endowment certificate, except in case when the endowment is made payable to wife and children the names of the children may be omitted, and, in the event of such member's death, all surviving children of deceased shall be considered legal beneficiaries [provided, that an applicant may name as beneficiary his betrothed, his subordinate lodge, his endowment rank, section or a brother knight]. The interest of any person so designated, or their heirs, shall cease and determine in case of his or her death during the lifetime of such member. Upon the death of a member of this rank, the benefit, as specified in the endowment certificate, shall be paid by the supreme secretary, by warrant on the endowment rank depository, signed by

the president of the board of control and attested by the supreme secretary, through the secretary of the section, to the ¹⁷³ person or persons designated in said certificate, as entitled thereto. In case of the death of the person or persons designated as entitled to such benefit, before the same shall have accrued, it shall be paid to the widow and children of the deceased member; and if there be no widow nor children nor any of them, it shall be paid to the father and mother, sisters and brothers, share and share alike; provided, that the amount of said benefit shall be held sacred—a legacy to and for said legatees—and shall never, under any circumstances, be liable for, nor be appropriated to, the payment of any debts against the estate of said deceased member. If none of the persons herein designated as entitled to said benefit be alive when the same shall accrue [then, and in that case, the said benefit shall be paid to the lawful heirs of the deceased member, and, if there be no such heirs], the liability of the endowment rank, Knights of Pythias of the World, by reason of said certificate, shall cease and determine.”

It is clear that Carson, in causing the endowment certificate to be made payable to Bruzelius, did so for the purpose of pledging it to John F. Halpin Company, as a security for the debt due it by him. The bill of the Vicksburg Bank charges this fact, the respondent and cross-complainant, Mary Carson admits it, and Bruzelius himself, at the final hearing, virtually admitted the same thing. If, therefore, it was competent for Carson to dispose of his endowment certificate in that manner, the right of the bank to the fund is complete. It is settled that the right of a beneficiary of a benevolent society, like this of the Knights of Pythias, is inchoate, imperfect, and ambulatory until the death of the member holding the endowment certificate; that such right is a mere expectancy, liable to be defeated by a change of appointment legally made. As Carson surrendered to the supreme lodge of the Knights of Pythias the endowment certificate, payable to his wife, Mary Carson, she can predicate no right to this fund of such surrendered certificate. It was canceled.

¹⁷⁴ The Knights of Pythias is a corporation created by law. A corporation possesses only the powers and capacities which are specifically granted by the act of incorporation, and such as are necessary to carry into effect the powers expressly granted; it can only make such contracts as are connected with the purpose for which it was created, and which are necessary, either directly

or indirectly, to answer that end. The Knights of Pythias, under the act of Congress authorizing its creation for benevolent purposes only, has prescribed to itself a constitution and by-laws in harmony with said act, whereby it undertakes, in consideration of certain dues and assessments, to secure, on the death of the member, a pecuniary benefit to his widow and children, or, if he leaves no widow or child, to his father and mother, sisters and brothers, and to no other persons. Its constitution expressly declares that the amount of the benefit shall be held sacred, a legacy to and for said legatees, and shall never, under any circumstances, be liable for, nor be appropriated to, the payment of any debts against the estate of the deceased member.

It is obvious that, if the member holding the endowment certificate could validly transfer it to his creditor as a security for his debt, the policies of such societies, like those of regular insurance companies, would become, to some extent, the subject of trade and speculation, in contravention of the expressed policy of the law creating them, and in total subversion of the avowed objects of these associations.

It was taken for granted, in *More v. Bennett*, 140 Ill. 69, 33 Am. St. Rep. 216, that the constitution and by-laws of an association constitute the contract between the society and its members. While the right of the beneficiary of a mutual benefit society of this kind is contingent during the life of the appointor or donor, yet this imperfect and ambulatory right becomes a vested interest on his death. Does this vested right go to Bruzelius for himself beneficially, or to him as trustee for creditors, or as trustee for the widow and children? In our judgment the real ¹⁷⁵ beneficiaries can only be the persons specified in the laws of the order, to wit, the widow and children, and that Bruzelius is a trustee for them. Owing to a difference in the laws of the Knights of Pythias from the laws of other similar societies where like contests have arisen, and which are reported in the books referred to in the briefs of the learned counsel in this case, we find no case involving the precise point in this case. Some of them, by analogy, throw a faint light upon it, but it is dim and uncertain. If, by reason of the change of the constitution of the Knights of Pythias before the death of Carson, the appointment of Bruzelius was revoked, still, a like result would happen, and the fund should go to the widow and children.

Wherefore the decree rendered in the court below is reversed,

the cause is remanded, with leave to Mary Carson to amend her answer and cross-bill, and make the children of Carson parties, if there be any, and that the case proceed according to the principles announced in this opinion.

MUTUAL BENEFIT SOCIETIES—BENEFICIARIES OF CERTIFICATE—WHO MAY BE.—Either the statutes of the state, or the charter or by-laws of municipal benefit societies, usually provide that the fund is established for the benefit of the widows, children, orphans, relatives, or dependents of deceased members; and where such provisions is made, the beneficiary designated must be one of the class named, and not a creditor or other person not related to deceased member: See monographic note to *Bankers' etc. Assn. v. Stapp*, 19 Am. St. Rep. 786-790; monographic note to *Lake v. Minnesota etc. Assn.*, 52 Am. St. Rep. 568-572.

MUTUAL BENEFIT SOCIETIES—CHANGE OF BENEFICIARIES.—The nomination of a beneficiary gives him no vested right to the benefit, and the member may at any time substitute another person or class of persons, unless restrained by the rules of the society: See monographic note to *Banker's etc. Assn. v. Stapp*, 19 Am. St. Rep. 789. The beneficiary has no interest or vested right in the fund or bounty until the death of the member: See monographic note to *Lake v. Minnesota etc. Assn.*, 52 Am. St. Rep. 563.

HALL v. ALLEN.

[75 MISSISSIPPI, 175.]

A BENEFICIAL ASSOCIATION BY THE PAYMENT INTO COURT of the proceeds of a certificate of membership waives the objection that a change in the beneficiary did not comply with the rules of the order; and no other person can urge the objection which the association has thus waived.

BENEFICIAL ASSOCIATIONS — CHANGE IN BENEFICIARY—WANT OF CONFORMITY TO THE LAWS OF THE ASSOCIATION, WHEN EXCUSED.—If the holder of a benefit certificate intends to change the beneficiary in accordance with the laws of the association, and does all he can toward that end, but does not comply with all of the requirements because of his physical inability and his not having the certificate in his possession, a change is thereby accomplished. The mode of changing beneficiaries pointed out by the laws of the association is not exclusive, at least, when it waives want of conformity to its laws.

Action to recover the amount of a certificate of membership issued to George M. Seay by the Brotherhood of Locomotive Firemen at Vicksburg, and made payable to his mother. She died prior to her son, but while he was ill, and he, on being informed of her death, expressed a desire to have the policy made payable to his sister. He sent a friend to Vicksburg to have the change made, and for this purpose wrote the name of the new beneficiary in a book, to prevent the friend from forgetting it

and to enable him to get the policy changed. The friend proceeded to Vicksburg, as requested, and went to the room of the order, where the members in attendance were not sufficient to hold a meeting. Nothing further was done, nor was any notice given to the president or secretary, and during the ensuing night the member died. The sister brought her action against the Brotherhood and also against the administrators and heirs at law of the decedent and of the original beneficiary. The trial court decided in favor of the plaintiff, and the defendants appealed.

Dabney & McCabe, for the appellants.

Shelton & Brunini, for the appellees.

211 WHITFIELD, J. The payment of the money into the bank had the effect to remit the legal question of who was the rightful claimant of the fund arising from the benefit certificate to the court. It had no effect as between the rival claimants, but it did operate a waiver by the order, so far as its rights were concerned, of conformity of the change in the benefit certificate to the provisions of section 66 of the constitution of the grand lodge, so long, at least, as the order did not appear as a party resisting the payment. The order is no party here, does not set up such want of conformity, and no other party can, in such case, invoke the said section 66, intended alone for the protection of the order: *Titsworth v. Titsworth*, 40 Kan. 571.

On the facts of record, we think the insured intended to make the change in the beneficiary in accordance with section 66, and manifested that intention by doing all he could do toward that end, situated as he was. He wrote the name, Emma Allen, in the note-book of his selected agent, but, from physical inability, **212** could write no more. He seems not to have been able to write the day he died, or, perhaps, the day before. He gave full verbal instructions and authority to Porter. His certificate was not in his possession—the old one having been exchanged for a new one—but was locked up in the desk of the secretary of the subordinate lodge at Vicksburg, so that he could not personally comply with section 66. He had not been in Vicksburg for two weeks prior to his death, and the new certificate, which it was the duty of the subordinate lodge to deliver to him, had been, for two weeks, in the custody of the secretary of that lodge.

The intention that the sister, Mrs. Emma Allen, should be the beneficiary, is abundantly shown, and the reason therefor.

On this state of case we approve and adopt the language of the supreme court of Texas, in *Splawn v. Chew*, 60 Tex. 536, 537: "A method by which he may accomplish it [the change in the beneficiary], to the satisfaction of the order, is pointed out in the section last recited, but we do not consider this as exclusive of all other ways of effecting the same object. The design of this section is to protect the interests of the corporation. The company is entitled to know who are the parties entitled to the benefit money, and this is an effective and certain means of giving that information. But, like all such provisions in the by-laws of private corporations [the order being the American Legion of Honor, a mutual benefit order, as here], it may be waived at the option of the corporation, being for its benefit alone."

Seay, having repeatedly declared his intention that his sister, Mrs. Emma Allen, should be the substituted beneficiary, and having actually done all he could in his condition to accomplish that purpose, and to accomplish it in the very mode prescribed by section 66, his acts being partly in writing and partly in parol, equity will treat that as done which ought to have been done, and decree as if the change had been made in conformity with said section. It will perfect his imperfect and incomplete, but partly accomplished, purpose, and act and deal with it as ²¹³ perfected, as between these claimants. The case falls strictly within the second and third exceptions to the general rule pointed out by Justice Brown, now of the United States supreme court, in *Supreme Conclave etc. v. Coppella*, 41 Fed. Rep. 1, cited in 1 *Bacon on Benefit Societies*, sec. 310 a. And in such case it is well settled that the death of the assured, before the completion of the change in the beneficiary, makes no difference. The authorities following thoroughly settle the correctness of these views: *Splawn v. Chew*, 60 Tex. 536; *Schmidt v. Iowa etc. Ins. Assn.*, 82 Iowa, 304; *Titworth v. Titworth*, 40 Kan. 571; *Nat. Assn. etc. v. Kirgin*, 28 Mo. App. 80; *Rollins v. McHatton*, 16 Colo. 207, 208; 25 Am. St. Rep. 260; *Knights of Honor v. Watson*, 64 N. H. 517; *Brown v. Mansur*, 64 N. H. 39; *Bacon on Benefit Societies*, secs. 310, 310 a.

There are other views leading to the same conclusion we have announced, and a multitude of authorities could be marshaled. But the briefs of the very able counsel for appellant and appellee present their various contentions with such unusual clearness and force, and marshal the authorities with such discriminating accuracy in support of these contentions, that the pro-

fession will get from them, when published in full, as we now direct them to be by the reporter, all the light we could throw upon the subject by any further elaboration.

Affirmed.

MUTUAL BENEFIT SOCIETIES—CHANGE OF BENEFICIARIES—WAIVER OF DEFECT IN.—Although generally the insured is bound to make a change of his beneficiary in the manner pointed out by the policy and by-laws of the association, yet if it is beyond his power to comply literally with such regulations, a court of equity may treat the change as having been legally made: *State v. Tomlinson*, 16 Ind. App. 662; 59 Am. St. Rep. 335, and note. The association may waive formalities required by its charter to be complied with in changing beneficiaries: See monographic note to *Lake v. Minnesota etc. Assn.*, 52 Am. St. Rep. 562; as by paying the amount due into court to be awarded to the person found to be entitled thereto: *Adams v. Grand Lodge*, 105 Cal. 821; 45 Am. St. Rep. 45.

COX v. MARTIN.

[76 MISSISSIPPI, 229.]

SHERIFF—EXPIRATION OF TERM.—When a sheriff, by virtue of his office, acts as administrator of a decedent, his right to so act terminates with his term of office, and if in his official capacity he has brought an action of replevin, his successor in office may be substituted in his place as plaintiff.

REPLEVIN.—A JUDGMENT IN FAVOR OF THE DEFENDANT IN REPLEVIN who has given bond and retained possession of the property is not in the alternative, because he is already in possession.

CONTRACTS ARE ORDINARILY ENFORCEABLE AGAINST THE PERSONAL REPRESENTATIVES of deceased parties to the extent of assets which have come to their hands. Hence, where a trust deed authorizes the trustee, in certain contingencies, to take possession of a crop, which is subject thereto, it continues in force after the death of the grantor and as against his personal representative, and the trustee is entitled, not only to take such possession, but to retain it until indemnified for advances made by him in caring for and cultivating the crop, as well as for the amount remaining unpaid on the original indebtedness.

LIEN OR PREFERENCE OUT OF PROCEEDS OF PROPERTY.—Necessary expenses incurred in caring for property, since they are for the common benefit of all, may be recovered as a privileged claim when made by a party in interest. Hence, if crops to be grown on a farm are conveyed by deed of trust, after which the grantor dies, either his administrator or the trustee properly making advances for the cultivation of the crop is entitled to be indemnified therefrom for the amount of such advances.

CONTRACT—CONTINUANCE AFTER THE DEATH OF THE PARTIES—TESTS OF.—Where a contract of a decedent is executory and the personal representative can fairly and fully execute it as well as the decedent himself would have done, he may do so, and enforce the contract; and, on the other hand, the personal representative is bound to complete such contract, and failing to

do so, may be compelled to pay damages out of the assets in his hands.

EXEMPTIONS—HEAD OF A FAMILY.—One who has living with him an able-bodied adult son, capable of maintaining and supporting himself, is not, on that account, entitled to exemption as the head of a family.

Action of replevin brought by Jones as administrator of Jonathan Payne against W. P. Cox. The plaintiff, at the commencement of the action, was sheriff and, as such, entitled to act as administrator, but his term of office having expired during the pendency of the action, his successor in office was substituted in his stead. The action was to recover certain crops. These had been the subject of a trust deed made by Payne in his lifetime to W. P. Cox, trustee, for the benefit of Mrs. E. A. Cox, to secure a pre-existing debt, and also advances to be made for supplies. Payne died before the maturity of the crops, after having drawn part of the advances which he was entitled to have made to him. The original plaintiff, after being granted letters of administration, obtained an order of court authorizing him to cultivate, complete, gather, and sell the crops, and he obtained further supplies, as provided in the deed of trust. Afterward, the trustee took possession of part of the crops by virtue of a clause in the trust deed authorizing him to do so in case the property was about to be removed, and at a later date he took possession of the balance. The trial court excluded all evidence tending to show supplies furnished to the administrator after the death of Payne, but admitted evidence showing what expenses were incurred in gathering and preparing for market so much of the crop as was necessary to secure the payment of the debts due from Payne at the time of his death. It was claimed that Payne was a householder and the head of a family and as such entitled to certain exemptions, on the ground that he had living with him an able-bodied adult son who, it was admitted, was capable of maintaining and supporting himself. The jury found as follows: "We, the jury, find the amount as below due plaintiff as administrator of Payne: Ten bales of cotton at thirty-seven dollars and fifty cents per bale; two hundred and fifty bushels of corn, at twenty-five cents per bushel; and two hundred and forty bushels of cotton seed at six cents per bushel; and find, after taking off one bale of cotton, thirty-seven dollars and fifty cents, and nine head of cattle, forty-eight dollars, balance due Mrs. E. A. Cox, one hundred and thirteen dollars and eighty-five cents." Judgment was thereupon entered that the defendant retain one hundred and thirteen dollars and eighty-five cents out of the pro-

ceeds of the first crops seized by him, and that he pay the balance to the plaintiff. Defendant appealed.

Robertson Horton, for the appellant.

W. C. McLean, for the appellee.

²³⁶ WHITFIELD, J. The court properly allowed Martin to be substituted for Jones in the replevin suits. Jones' power to act as administrator ended with his term of office as sheriff, though, as to liability for his acts as administrator, he would still have been amenable. There were not two administrators at one time, but successively, each becoming such under the statute, section 1859 of the code of 1892. Nor was there any error in overruling the objection that Jones sued as an individual. The suits were by him in his capacity as administrator. But we think the verdict in this case—a most anomalous one—is, in legal effect, a finding for the defendant. It manifestly ascertains a debt of one hundred and thirteen dollars and eighty-five cents due the beneficiary in the trust deed, even under the ruling of the court that a claim for advances made, with which to make the crop after Payne's death, could not be set up in these suits at law.

It is settled in *Dreyfus v. Cage*, 62 Miss. 733, that the principle of *Bates v. Snider*, 59 Miss. 497, does not apply to a case where the creditor defendant has bonded the property, and he wins. "No alternative judgment," said the court, "can be awarded in favor of the defendant, for the reason that he is already in possession of the property. The principle announced in *Bates v. Snider*, 59 Miss. 497, is applicable only to cases in which a party has rightly recovered a judgment for the possession of property, but has only a limited interest in it for the security of a debt less than its value. . . . The single question to be tried in this case is whether, at the time of the institution of the suit, the plaintiff was entitled to the possession of the property. He was not so entitled if, at that time, any part of the debt secured was unpaid."

So here the only proper judgment, the jury finding a debt due Mrs. Cox, was that the defendant retain possession of all ²³⁷ the property replevied. The trustee would, of course, then deal with it under the terms of the trust deed—sell to pay the debt due, et cetera. But the court below refused to allow the defendant to show the advances made, under the trust deed, to complete the crop within the limit of two hundred and fifty dollars, and also refused to allow him to show the whole amount of ex-

penses incurred in the necessary completion and preservation of the whole crop, limiting the advances to those made up to Payne's death, in June, and the expenses so necessarily incurred to those necessary to make and preserve so much only of the crop as would be sufficient to protect the advances of Mrs. Cox up to Payne's death, and the past advances of forty-eight dollars and fifty cents.

This action of the court proceeded upon the view that the contract was strictly a personal one with Payne, did not bind his personal representative, and was, hence, terminated by his death. It is true the contract does not name Payne's executor, administrator, heirs, or assigns. But says Mr. Freeman, in the note to *Chamberlain v. Dunlop*, 22 Am. St. Rep. 811, the most luminous treatment of the precise question under investigation we have anywhere found, after the most painstaking search: "It is a general rule of law that contracts bind not only the parties thereto, but also their executors or administrators. The law presumes that the parties to a contract intend to bind their personal representatives even when they are not named in the contract. Contracts are, therefore, generally speaking, enforceable against the personal representatives of deceased parties thereto to the extent of the assets which have come into their hands": Citing many authorities. And the administrator, having entered upon "the cultivation and completion" of this "growing crop," under section 1882 of the code of 1892, the proceeds—the necessary expenses being first deducted—were "assets in his hands." This crop, so far as necessary expenses in cultivating and completing it were concerned, was a primary fund for their payment as privileged claims: *Farley v. Hord*, 45 Miss. 96. And necessary expenses so incurred, ²³⁸ since they are for the "common benefit of all," may be recovered as a privileged claim, no matter by whom incurred, if he be a party in interest": *Strauss v. Baley*, 58 Miss. 131, 138.

Recurring now to the main question, it is clear that wherever the continued existence of the particular person contracted with—the contract being executory—is essential to the completion of the contract, by reason of his peculiar skill or taste, death terminates the contract; as, for example, "contracts of authors to write books, of attorneys to render professional services, of physicians to cure particular diseases, of teachers to instruct pupils, and of masters to teach apprentices a trade or calling." So, also, when the continued existence of a particular thing is essential to the completion of the contract, the destruction of the existence of the thing (its death) terminates the contract—as, in

contracts for the sale of specific chattels, or for the use of a building, they ceasing to exist: 1 Beach on Modern Law of Contracts, sec. 773, p. 946, note 3, with the authorities cited. "But where the contract with the deceased is executory, and the personal representative can fairly and fully execute it as well as the deceased himself would have done, he may do so, and enforce the contract. And, on the other hand, the personal representative is bound to complete such a contract, and, if he fails to do so, he may be compelled to pay damages out of the assets in his hands": Note, with authorities, to *Chamberlain v. Dunlop*, 22 Am. St. Rep. 818.

The authorities clearly mark out and sustain these distinctions. Thus, if a purchaser who has ordered goods dies before the time for their delivery, the executor or administrator must receive and pay for the goods, or he will be liable to the extent of the assets in his hands for the damages that may be sustained by reason of the refusal to complete the contract of the deceased: 1 Addison on Contracts, sec. 453; 1 Beach on Modern Law of Contracts, sec. 774, note 4; *Martin v. Hunt*, 1 Allen, 418; *Wentworth v. Cock*, 10 Ad. & E. 42; *Cooper v. Jarman*, L. R. 3 Eq. 98. If a person contracts to build a house for ²³⁰ another before a certain day, and dies before that day, his personal representative must go on and finish the house: Note to *Chamberlain v. Dunlop*, 22 Am. St. Rep. 812, and authorities. And, in such case, the personal representatives of the builder are bound to complete his building contracts: *Janin v. Browne*, 59 Cal. 37, while see, specially, 1 Beach on Modern Law of Contracts, sec. 231, p. 288, notes 8, 9, 10, with the authorities. And the personal representative of the person for whom the house is to be built must pay for its completion out of the personal estate in the first instance: Note to *Chamberlain v. Dunlop*, 22 Am. St. Rep. 812. For many other illustrations, too numerous to set out herein, see 1 Beach on Modern Law of Contracts, secs. 231, 773, 774, and the masterly note of Mr. Freeman to *Chamberlain v. Dunlop*, 22 Am. St. Rep. 811-815.

We instance but three more: A contract for hiring for a year to do ordinary farm work is not terminated by the employer's death: 1 Beach on Modern Law Contracts, sec. 774, and note 5. And where a continuing pecuniary obligation is created by a guaranty, the consideration for which is entire and given once for all, the contract is not terminated by the death of the guarantor, unless the intention that it shall so terminate is clearly expressed in the guaranty itself: Note to *Chamberlain v. Dunlop*,

22 Am. St. Rep. 814. And a covenant to be responsible for and guarantee payment of the interest on a mortgage until the mortgaged premises should be so improved as to constitute adequate security for the debt, survives the death of the covenantor: Note to Chamberlain v. Dunlop, 22 Am. St. Rep. 814. In all these cases the law implies the intention that, in the one class, the contract shall, and in the other it shall not, be terminated by death: Chamberlain v. Dunlop, 22 Am. St. Rep. 811, 812. The parties may, of course, by express terms, agree that the contract shall be strictly a personal one, and thus, by the terms of the contract, exclude substituted performance, and the death of either party would, of course, then terminate the contract: 1 Beach on Modern Law of Contracts, sec. 231, p. 288, and note 11; Siler v. Gray, 86 N. C. 566, 570, an excellent illustrative ²⁴⁰ case of the distinction between the two classes of contracts. See, also, Bishop on Contracts, secs. 620, 622; Blond v. Umstead, 23 Pa. St. 316; Shultz v. Johnson, 5 B. Mon. 497, showing that, in addition to the considerations above suggested, reference must also be had to the subject matter of the contract, and that the test, at last, always is, What was the intention of the parties? This last case was properly decided upon the ground that the parties contracting there for hemp of the other party's "own raising," were buying that particular quality of hemp to sell again.

And, finally, it is well said by Mr. Freeman in the note, *supra*, that the line of demarcation between the two kinds of contracts is not very clearly marked in some instances, as is shown by a comparison of the case of Dickinson v. Calahan, 19 Pa. St. 227, where a contract to sell all the lumber to be sawed at his mill during five years, the heirs and representatives not being mentioned, was held dissolved by the party's death, with the subsequent case in Billing's Appeal, 106 Pa. St. 558, where it was held that a contract for the cutting of timber, not involving expert skill, which did embrace the personal representatives and heirs, did survive. But the obscurity of instances like these does not affect the clearness of the distinction between the two classes of cases marked out by well-considered authorities. In determining whether a contract is a strictly personal one or not, it is doubtless true that, as stated by Mr. Freeman, "the facts and circumstances of each particular case will be taken into account." We refer specially also to the masterly opinion of Judge Peckham in Chamberlain v. Dunlop, 22 Am. St. Rep. 807. If, now, we turn from this review of the authorities elsewhere to our own reports, we shall find but two cases

bearing on the question: *Alsup v. Banks*, 68 Miss. 664, 24 Am. St. Rep. 294, where it was held that the administrator of a lessee of lands for five years, the lessee having died in the first year, was bound to carry out the contract, there being no discussion, however, and *Hill* ²⁴¹ v. *Robeson*, 2 Smedes & M. 541, in which it was held that when a planter employed an overseer for one year for three hundred dollars and died in May of the year, and the overseer rendered the services for the whole year, death did not terminate the contract and the administrators of the planter were bound to pay for all the services rendered, both before and after the employer's death. This case—like the case cited, *supra*, *Martin v. Hunt*, 1 Allen, 418, where the personal representative was bound to receive and pay for goods ordered in his lifetime by the deceased, is in principle directly in point; for if the employer's administrator is bound to pay the overseer for services rendered after the employer's death, in making a crop, why is not the farmer's administrator bound for supplies furnished after the farmer's death, necessary to make that crop? There is no difference in principle between the cases.

What, now, are the particular facts of this case? There is nothing in this record to show that Jones, the administrator, could not fully and fairly carry out and complete this contract as well as the deceased could have done. On the contrary, the whole tendency of the evidence is to show not only that he could, but that he did. He retained Payne's son, on his contract with his father, as agent, and he, in a written order, called on Mrs. Cox to furnish supplies, which she did, to cultivate and complete this growing crop—both manifestly acting under the mutual obligations of the contract, the trust deed. Mrs. Cox had the right, under this contract, to look to the whole crop for security for what she had advanced before Payne's death, and the correlative right, necessarily, to make the advances and incur the expenses necessary to the preservation, cultivation, and completion of such crop, so as to make it an available security, and she also clearly had the right—and such, manifestly, from the contract, the subject matter, and the relative situation of the parties, was their clear intention—to make such advances and incur such necessary expenses after his death. We are, therefore, clearly of the opinion that this contract was one ²⁴² which was not terminated by Payne's death, and which, consequently, his personal representative was bound to complete, and that to the extent of the proceeds of such crop, "necessary expenses being first deducted," he was liable in these suits to re-

spond. Mrs. Cox had the right to hold the crop, under the contract, for all supplies advanced thereunder, and if any of such expenses were incurred outside of the contract, she was entitled to them by virtue of the principle that they were incurred of necessity for the "common benefit," and that, being thus incurred, she had, as to them, on that distinct and independent ground, a prior right of payment out of the crop: *Strauss v. Baley*, 58 Miss. 131.

Under the view, now settled for us, taken by this court of the exemption law, in *Hill v. Franklin*, 54 Miss. 632, and *Powers v. Sample*, 72 Miss. 189, 191, Payne was not entitled to the exemptions claimed.

For the reasons indicated the judgment is reversed and the cause remanded.

REPLEVIN—ALTERNATIVE JUDGMENT—WHEN UNWARRANTED.—Alternative judgment in replevin suits is rendered for plaintiff only when the property is not in plaintiff's possession; and if, during the pendency of the action, the property has been delivered to the plaintiff, an alternative judgment is unauthorized: Note to *Swantz v. Pillow*, 7 Am. St. Rep. 100. See note to *Etchepare v. Aguirre*, 25 Am. St. Rep. 183.

CONTRACTS—WHEN OBLIGATION CONTINUES AFTER DEATH OF CONTRACTOR.—It is a general rule of law that contracts bind, not only the parties thereto, but also their executors or administrators. The law presumes that the parties to a contract intend to bind their personal representatives, even when they are not named in the contract. Contracts are therefore, generally speaking, enforceable against the personal representatives of deceased parties thereto, to the extent of assets which have come into their hands: See monographic note to *Chamberlain v. Dunlop*, 22 Am. St. Rep. 811-815. See *Drummond v. Crane*, 159 Mass. 577; 38 Am. St. Rep. 460; *Marvel v. Phillips*, 162 Mass. 399; 44 Am. St. Rep. 370.

EXECUTION — HEAD OF FAMILY — WHO IS.—A husband in one state with a family in another cannot be considered as the head of a family in the former, though he shows that during his residence in the former state he was accompanied by his son. He must show his son to be dependent upon him for support: See monographic note to *Wade v. Jones*, 61 Am. Dec. 589, as to who is the head of a family. See, also, *Bosquett v. Hall*, 90 Ky. 566; 29 Am. St. Rep. 404, and note; *Roberts v. Moudy*, 30 Neb. 683; 27 Am. St. Rep. 426; *Emerson v. Leonard*, 96 Iowa, 311; 59 Am. St. Rep. 372, and note.

GEORGIA HOME INSURANCE COMPANY v. HOLMES.

[75 MISSISSIPPI, 300.]

FOREIGN CORPORATIONS — PLEADING IN ACTION AGAINST.—It is not necessary in an action against a foreign corporation for the complaint or summons to show that it is a foreign corporation and that certain specified persons are its agents and, as such, authorized to receive service of summons.

ACTION — WHEN DEEMED COMMENCED. — An action against a foreign corporation must be regarded as commenced within one year after the cause thereof accrued, if within that time a complaint is filed and a summons issued in good faith, though it is not served within the year, and the complaint does not state that the defendant is a foreign corporation nor disclose the names of its agents on whom process can be served.

INSURANCE—ENCUMBRANCES—CONDITIONS AGAINST --WHEN NOT ENFORCEABLE.—If an insurance company issues a policy of insurance without requiring any application because its agent thinks he knows the condition of the property, and the policy contains a condition rendering it void if the property is encumbered, but the insured does not read the policy nor know of the condition until after a loss has occurred, the condition must be deemed waived.

Calhoon & Green, for the appellant.

McWillie & Thompson, for the appellee.

²⁰⁰ **WOODS, C. J.** There are two serious questions presented by this appeal, and they are as follows: 1. Was this action presented within one year after the loss by fire of the assured property occurred? 2. Was the policy avoided by the anti-mortgage clause contained therein?

We consider them in the order named. The loss is shown to have occurred on the thirtieth day of November, 1894, and the declaration was filed October 8, 1895, and summons issued for the Georgia Home Insurance Company immediately, to Scott county, returnable to the next term of the court. This process was not executed, as it appears, because no agent of the company was to be found in that county. In June, 1893, a substituted declaration was filed, the original, as well as the original policy of insurance sued on, having been lost, as is shown by the affidavit of appellee's counsel, and alias summons for the Georgia Home Insurance Company, and Ross and Yerger, agents, was then sent to Hinds county, and returned executed on Ross and Yerger, agents, August 3, 1896. On the 3d of August, 1896, an alias summons was sent to Lauderdale county, for the Georgia Home Insurance Company, and this summons was returned August 10th, executed on I. I. Solomon, agent for the Georgia Home Insurance Company.

The company, by its counsel, appeared in court on September ⁴⁰⁰ 21, 1896, and filed many pleas, and on March 15, 1897, the company's counsel withdrew its fifth plea, and filed, by leave, what is called the substituted fifth plea. This substituted fifth plea it is which raises the question of the limitation of the one year provision as to bringing suit.

By this substituted fifth plea, it is averred that the declaration

named no defendant, failed to show that the defendant was a foreign insurance company, and did not state the names of the agents of this foreign company who were authorized to accept service of process. In a word, the plea avers an absence from the declaration of the facts necessary to confer jurisdiction upon the court in which it was filed, and sets up, also, the facts as to the summons already stated by us, and the further fact that when appellee's counsel were informed by the sheriff of Scott county that no agent of the company was in that county, they directed that officer to do nothing further with the writ until he should hear from them, and that nothing further was done with the writ.

Was it essential that the declaration and summons should have shown that the defendant was a foreign corporation, and that certain named persons were its designated agents to receive service of process?

In *Continental Ins. Co. v. Mansfield*, 45 Miss. 311, this question appears to have been answered affirmatively. Certainly it is held in that case that the declaration must show these so-called jurisdictional facts, and it is said that it would have been well if the summons had followed the declaration in these particulars. We are not quite sure what the opinion of the court was. If it holds, as counsel for appellant in the case now before us thinks it does, that the declaration was no declaration, and that the summons was void, then the judgment in that case was most singular, for by it the suit is treated as a pending one, and "leave given the plaintiff to apply for liberty to amend." How could he amend a pleading which was a nullity? And how amend a summons which was void?

⁴⁰¹ But, regarding the court as holding in that case that the declaration and summons must allege that the defendant is a foreign insurance company, and that certain named persons are the duly authorized agents of the company to receive service of summons, we feel constrained to declare the holding erroneous. It rests upon what seems to us a total misconception of the nature of the act which it was attempting to construe. The act was not one of pleading or practice. Its manifest object, its sole object, was to prescribe the terms and conditions upon which foreign insurance companies would be permitted to enter this state, and do business with our people, and all our rules of pleading and practice were left wholly unaffected by it. We refer to the case to condemn it, simply that it may not mislead further.

In addition, in the case before us, the original policy, which was filed with the declaration as part of it, and which is expressly made so by our statute (Code of 1892, secs. 676, 677), plainly discloses on its face, that the defendant herein is a foreign corporation, to wit, a corporation under the laws of the state of Georgia.

Then, too, by section 3433 of the Code of 1892, and the amendatory act of February 2, 1894, it is now distinctly provided that in suits against insurance companies, process may be served on any agent of the defendant. This provision as to service of process on insurance companies was not contained in the Code of 1857, which was in force when *Continental Ins. Co. v. Mansfield*, 45 Miss. 311, arose and was decided.

We see no reason for believing that the first summons to Scott county was not issued in good faith, and, under the views already announced, we are of opinion that the suit was instituted within one year after the loss occurred.

2. Was the policy avoided by the anti-mortgage clause contained therein? The evidence shows that the appellee sent to the company's agent who issued the policy, requesting him to send a blank ⁴⁰² form of application for insurance, and also to send a man to inspect the house on which the insurance was desired. The company's agent did neither, saying, in effect, that he knew the condition of the property. It now appears that this agent was mistaken in two important particulars. He made out a policy without any written application having been made, or, indeed, any application other than that contained in what we have just stated, and sent it to Holmes. This agent, who knew about the property, made out the policy for a single story house, when, in fact, it was a two-story building, and he thought the property was free from encumbrance, perhaps, when, in fact, it was encumbered by a trust deed of record for one hundred and fifty dollars. The first policy, which misdescribed the house, was replaced by another, correctly describing it, the policy sent appellee (who never read it until after the loss occurred, and who was in ignorance of the anti-mortgage clause until his attention was called to it by the company's agent when a settlement of the loss was sought), and the premium paid and accepted.

This is a case, then, in which no application—no formal application—was made, because the agent held it unnecessary, inasmuch as he knew about the condition of the property, and a case in which appellee did not know there was any anti-mortgage clause contained in the policy until after the loss, and the ques-

tion is, whether the company shall now be permitted to repudiate its contract made, not upon any misrepresentations, or even representations, of the insured, but upon its own knowledge of the condition of the property. If this policy was issued upon the knowledge of the company as to the condition of the property, and after refusal to furnish the usual blank application, whereby the insured would have apprised the insurer of the true condition of the property, and not upon any representation of the insured, then the anti-mortgage clause must be held to have been waived. Any other view would involve the holding by us of this proposition: that the insurance company, waiving ⁴⁰³ any application by the person desiring insurance and issuing a policy upon its own knowledge of the condition of the property, may receive the premiums paid for the indemnity, and defeat a recovery for a loss sustained by inserting in the policy a provision invalidating the contract from the moment it was signed and delivered, thus inducing the insured to rest upon a contract which the company never intended to carry out. This cannot be sound law.

Affirmed.

ACTIONS—WHEN DEEMED COMMENCED.—It is undoubtedly the general rule in the United States, except where it has been otherwise provided by statute, that an action is deemed commenced, so far as the parties to it are concerned, from the time that the summons or other process is issued and delivered, or put in course of delivery to the officer, with a bona fide intent to have it served: *Extended note to Ross v. Luther*, 15 Am. Dec. 344, 345; *Montague v. Stelts*, 87 S. C. 200; 34 Am. St. Rep. 736, and note; although it is not actually served: *Johnson v. Farwell*, 7 Greenl. 370; 22 Am. Dec. 203.

CORPORATIONS—ACTIONS AGAINST—PLEADING CORPORATE EXISTENCE.—In an action against or by a corporation it is unnecessary to aver its corporate existence: *Holden v. Great Western Elevator Co.*, 69 Minn. 527; ante, p. 585, and note.

INSURANCE — FIRE — CONDITION AGAINST ENCUMBRANCES—HOW WAIVED.—If an insured is not questioned concerning encumbrances on his property or other facts material to the insurance, and does not intentionally conceal them, their existence does not invalidate the policy: *Dooly v. Hanover Fire Ins. Co.*, 16 Wash. 155; 58 Am. St. Rep. 26, and note; *Hanover Fire Ins. Co. v. Bohn*, 48 Neb. 743; 58 Am. St. Rep. 719, and note. A similar waiver arises where the agent of the insurance company was aware that the insured property was on leased ground, and made out the application himself: *Germania Fire Ins. Co. v. Hick*, 125 Ill. 361; 8 Am. St. Rep. 384.

WHITE v. MARTIN.

[75 MISSISSIPPI, 646.]

EXEMPTION OF WAGES from execution does not prevent their being sold for the payment of poll taxes.

Slack & Mitchell, for the appellant.

Robertson Horton, for the appellee.

⁶⁵⁰ **TERRAL, J.** Alex. White and twenty-five others filed their bill of complaint in the chancery court of Grenada county against W. F. Martin, tax collector, of said county, alleging themselves to be day laborers, resident citizens of said Grenada county, who have no taxable property, and are employes of the Mississippi Cotton Oil Company at fixed daily wages, ranging from six dollars to nine dollars and fifty cents per week, payable at the end of each week; that said Cotton Oil Company owes said complainants severally for their wages for the week ending February 20, 1897, and that said tax collector is proceeding under section 3826 of the code of 1892, to collect the poll taxes due by the complainants to the state of Mississippi by a sale of the debts due them severally and respectively from said Cotton Oil Company for said week ending February 20, 1897; and they asked and obtained an injunction against the sale of their said debts by said tax collector. The chancellor, upon the hearing, dissolved the injunction, and rendered a decree for taxes, damages, and costs, and the complainants appeal.

We are of the opinion that the debts due complainants from the Cotton Oil Company for daily wages may be sold by the tax collector, under section 3826 of the Code of 1892, to pay the taxes due from complainants to the state. We do not regard *Ratliff v. Beale*, 74 Miss. 247, as covering this case. All debts of every kind are taxable under our code, as we construe it, and hence may be levied upon for the payment of taxes. The claim of these ⁶⁵¹ laborers (the complainants) does not come within the letter of the statute. They have nothing to stand upon except the strict letter of the law, and that is against them.

The decree of the chancery court is affirmed, and the appeal is dismissed at the costs of the appellants.

EXECUTION—EXEMPTION FROM CLAIM FOR TAXES.—No property is exempt from execution in case of default for taxes. *Scales v. Alvis*, 12 Ala. 617; 46 Am. Dec. 269.

ZACHERY v. MOBILE AND OHIO RAILROAD COMPANY.

[75 MISSISSIPPI, 746.]

CARRIER OF PASSENGERS.—A BLIND MAN CANNOT LAWFULLY BE EXCLUDED from a railway train because he is not attended by any assistant.

Buckley & Halsell, and D. W. Heidelberg, for the appellant.

J. A. P. Campbell, for the appellee.

⁷⁵² **WHITFIELD, J.** The demurrer to the special plea should have been sustained. The former opinion of this court stated this. The blind man in this case "had, at the times referred to in the declaration, when he applied for tickets and permission to travel on defendant's cars, as much skill and ability to travel without help or attendants as any blind man could have." The declaration avers that, though blind, he was otherwise qualified to travel on the railroad cars, and, in fact, had traveled for several years constantly on appellee's railroad without objection. The demurrer to this declaration was overruled, and the present demurrer to the special plea presents the same objections, and, of course, should have been sustained. It is not every sick or crippled or infirm person whom a railroad regulation can exclude, but one so sick or so crippled or so infirm as not to be able to travel without aid. And so it is not every blind person, but one who, though blind, is otherwise incompetent to travel alone on the cars. Otherwise we would be compelled to hold that one suffering from sickness, no matter how slight, or one who had lost an arm or leg, or one, no matter how active physically, and no matter how expert a traveler, though being blind, could be shut out by such a rule. And this ought not to be, and cannot be, sound law. We are asked to hold that a regulation that no blind person whatever shall travel unaccompanied by an assistant, no matter how skillful or expert a traveler he may have been, or may be, and no matter how perfectly ⁷⁵³ qualified in every other respect to travel on cars unaccompanied, is a reasonable rule. This cannot be sound. Each case must depend on its own facts, and the reasonableness of the refusal to sell the blind person a ticket must, on principle, depend not on a universal, arbitrary, and indiscriminating rule like this one, but on the capacity to travel unaccompanied, of the particular blind person, as shown by the proof on that point in his case.

Judgment reversed, demurrer to special plea sustained, and remanded.

CARRIERS OF PASSENGERS.—A common carrier of passengers cannot refuse to carry a person, otherwise qualified, upon the sole ground that he is blind: *Zachery v. Mobile etc. R. R. Co.*, 74 Miss. 520; 60 Am. St. Rep. 529, and note.

PEOPLE'S BANK v. SMITH BROTHERS & COMPANY.

[75 MISSISSIPPI, 752.]

GARNISHMENT—QUESTIONS WHICH MAY BE TRIED UPON.—In a proceeding by garnishment, where the person garnished admits having in his possession the moneys garnished, but claims that they do not belong to the defendant in the writ, but have been by him transferred to another, the court, if the plaintiff claims this transfer to be fraudulent and void as against him, has power to try and determine this issue.

F. M. Barber and Mayes & Harris, for the appellant.

White & Neville, for the appellee.

⁷⁵² **WHITFIELD, J.** It is true, as held in *Porter v. West*, 64 Miss. 548, that the plaintiff in attachment has no right to suggest for the garnishee that a third party claims the fund in the hands of the garnishee, that suggestion being permitted to be made by the garnishee, to protect him against a possible double payment of the debt garnisheed. But the case holds nothing further than that, in order to make such third person a party litigant to the issue, as between the plaintiff and himself, the garnishee in such case not making himself any contest, but paying the money into court and being discharged, the garnishee must suggest that such third party has a claim: Code 1892, sec. 2143. In order that a third party may thus become a party to the record, and "contest with the plaintiff the right to the money, debt, or property," it is a statutory condition precedent that he must be suggested by the garnishee as such claimant, ⁷⁵³ and be made such party litigant as a result of such suggestion by the garnishee. *West* was an assignee in a general assignment for creditors, and voluntarily came in propounding a claim to the debts due the assignors by the garnishees, they (the garnishees) having admitted they owed the debts to the assignors, and not having suggested that any third party had any claim to them. That is the whole extent of that case. It is no authority for the proposition that a garnishee who has been sum-

moned as such, and "notified" that the fund he holds is claimed by a third party, and who, instead of protecting himself under the statute by paying the money into court, and having the claimant summoned to "contest with the plaintiff the right to the fund," himself elects to litigate with the plaintiff the issue that ought to be litigated by the claimant, can object to the trial in this proceeding of the issue tendered by the traverse of his answer.

Mrs. Bulandi did not contest this issue in the circuit court. The appellant voluntarily did it for her. That issue arose on the traverse of appellant's garnishment answer, and was whether the money in bank deposited to the credit of Mrs. Bulandi was, in fact, the money of the debtor in attachment, her husband, by reason for a fraudulent transfer of it to her by him. "This special statutory proceeding was borrowed from equity jurisprudence": *Kellogg v. Freeman*, 50 Miss. 130. And we think it is settled by *Gregory v. Dodds*, 60 Miss. 549, and *Dodds v. Gregory*, 61 Miss. 351, that this inquiry can be made in this proceeding on the traverse of the garnishee's answer. The point made here that this is using garnishment process as a bill in equity to set aside a fraudulent transfer, must surely have been considered by the court in *Dodds v. Gregory*, 61 Miss. 351. Besides, a careful examination of the authorities has satisfied us that, on principle and authority, the view announced is the sound one. Cases cited by learned counsel for appellant do not sustain this contention: *Harris v. Phoenix Ins. Co.*, 35 Conn. 310, does not touch the question. In *Toomer v. Randolph*, 60 Ala. 356, it was held that, in that state in an action ⁷⁶⁰ at law—the mortgage there creating an estate in the land in the mortgagee—the rents collected by the mortgagee, who was in possession, were his (the mortgagee's) property, and not the mortgagor's, and of course not garnishable as the mortgagor's. So, in *Johnson v. Brant*, 38 Kan. 759, the court states that the money paid into the bank on Johnson's mortgage was never thereafter Clarke's money—the defendant. It had become Johnson's money, he holding a mortgage on lands on which the money was realized, executed by Clark. This money Clark's agent, Plaque, paid Johnson's agent, the bank, on Clark's admitted valid debt to Johnson. How could the bank be garnisheed as owing Clark, Johnson's money collected on his mortgage? The distinction is plain. *Kearney v. Nixon*, 19 La. Ann. 16, was an effort, by various irrelevant interrogatories, to get out of the garnishee evidence, and then, on that evidence, to have property owned by the

garnishee subjected to plaintiff's demands. The property in that case was claimed by the garnishee as his own, not belonging to anybody else in any way, or claimed by anybody else. That is not this case. The bank here does not claim to be the owner of the money, the deposit, in any absolute sense, so as, for example, that it does not owe Mrs. Bulandi the amount of the deposit. It claims, it is true, that the relation of debtor, on its part, exists to Mrs. Bulandi, in whose name the deposit was made. Not that it is not liable to Mrs. Bulandi, or the real owner of the deposit, in any event, as was the exact claim in the Kearney-Nixon case, but the very question at issue here is, To whom does the deposit, in fact, belong, Mr. or Mrs. Bulandi? And that it was competent to investigate and settle that issue made by the traverse of the garnishment answer in this proceeding, is, we think, well settled: *Dodds v. Gregory*, 61 Miss. 351; *Gregory v. Dodds*, 60 Miss. 549; *Drake on Attachment*, secs. 458, 598; *Waples on Attachment*, 213; *Kesler v. St. John*, 22 Iowa, 565; 8 Am. & Eng. Ency. of Law, 1st ed., 1180; *Fearey v. Cummings*, 41 Mich. 376; *Van Ness v. McLeod*, 2 Idaho, 1149.

The case of *Doggett v. St. Louis etc. Ins. Co.*, 19 Mo. 203, cited by ⁷⁶¹ appellant's counsel, squarely supports our view, and correctly distinguishes *Van Winkle v. Mc Kee*, 7 Mo. 435, the court saying: "When a person is summoned as a debtor of the defendant, and in his answer states the fact of an assignment of the debt to a third person, if such assignment is fraudulent as to the plaintiff, who is an execution creditor, then the garnishee is, so far as that proceeding is concerned, the debtor of defendant, and not of his assignee, and may be required to pay the money to satisfy the plaintiff's judgment. There is no other inconvenience in proceeding to determine the question of the validity of the assignment in this case. That would arise in any case in which a garnishee admitted himself to have been the debtor of the defendant, and then stated that some third person claimed the debt as assignee. In all such cases, the plaintiff has the right to have the fact tried, whether the garnishee is still the debtor of the defendant, so as to be liable to pay his judgment."

The case of *Hutchins v. Hawley*, 9 Vt. 295, is plainly distinguishable on several grounds.

The principle is, of course, limited by the consideration that the garnishee cannot be held for more than he had when served—for funds he had previously parted with—in this proceeding, as held in *Feary v. Cummings*, 41 Mich. 384.

Ordinarily, the plaintiff has no larger right against the garnishee than the debtor has; but in case of a fraudulent transfer by a debtor to a third party, the plaintiff may set it aside, though the debtor, in *pari delicto*, cannot: *Drake on Attachment*, sec. 458; *Van Ness v. McLeod*, 2 Idaho, 1150.

Affirmed.

GARNISHMENT—QUESTIONS TRIABLE UPON.—A garnishee must exhaust all legal means to avoid judgment against him: See monographic note to *Sessions v. Stevens*, 46 Am. Dec. 343. He may avail himself of every defense which could have proved available in an action brought against him by the defendant: Extended note to *Hanna's Syndicate v. Loring*, 18 Am. Dec. 341. When the answers of the garnishee are satisfactory to the plaintiff, the judgment of the court may be taken thereon; but when his answers are not satisfactory to the plaintiff, an issue may be made up and tried by a jury as in other cases: *Adams v. Filer*, 7 Wis. 306; 78 Am. Dec. 410.

REILY v. CARTER.

[75 MISSISSIPPI, 793.]

CROPS—FORECLOSURE SALE.—Crops unsevered from the land at the confirmation of a foreclosure sale become the property of the purchaser, though raised by a tenant of the mortgagor who was not a party to the foreclosure suit. It is otherwise with crops severed before the confirmation.

Bramlett & Tucker, for the appellant.

F. A. McLane, A. G. Shannon, and E. H. Ratcliffe, for the appellee.

200 WHITFIELD, J. The first sale under the foreclosure of the first trust deed took place January 4, 1896, and was confirmed, deed being executed and delivered March 16, 1896. The second sale under the foreclosure of the second trust deed occurred July 6, 1896, and was confirmed, deed being executed and delivered July 24, 1896. The land, and the crops growing thereon and unsevered from the soil, passed to the purchaser at the foreclosure sale, from the date of the confirmation of that sale, July 24, 1896. If any part of the nine bales of cotton had been gathered prior to that date (which can be shown by testimony on another trial), such part would go to the appellee, the purchaser from the sublessees of the land. Prior to the confirmation of the sale, the trust deed was a mere security for the debt. After the confirmation, the purchaser at the foreclosure sale had an absolute title, in which the security had become merged; and

the crops unsevered, then on the land, were as absolutely his as are the crops on any land the property of him who owns the land absolutely by full title.

⁸⁰¹ The mortgagee who enters after condition broken, whether in pais, or after judgment in ejectment, on the legal title he has after condition broken, is, under our statute and decisions, simply a mortgagee in possession, under a legal title, it is true, but a legal title to be used simply to make his security available. The rents and profits which he gets, while so in possession, he receives as the property of the mortgagor, to be applied in liquidation of the mortgagor's debt to him: *Buck v. Payne*, 52 Miss. 271; Code 1892, sec. 2449, with citations. Even if the mortgagee, after condition broken, secures merely a decree of foreclosure, that decree does not, *proprio vigore*, change the above rule: *Wathen v. Glass*, 54 Miss. 384; *Allen v. Elderkin*, 62 Wis. 628. But after the deed has been delivered, and foreclosure sale has been confirmed, the mortgagee claims no longer under the mortgage, as a mortgagee, having a mere security for his debt, and no estate in the land, but he claims, as absolute owner, under a confirmed sale and deed, having the whole estate in the land, and all the unsevered crops as part of the land. This is the true doctrine, clearly announced in the following decisions, from states which treat mortgages, as we do, as conferring no estate (by their execution) in the land, but as giving mere liens or security for the debt: *Beckman v. Sikes*, 35 Kan. 122; *Allen v. Elderkin*, 62 Wis. 628; *Downard v. Groff*, 40 Iowa, 598; *Smith v. Hague*, 25 Kan. 248; *Gregory v. Rosenkrans*, 72 Wis. 222; *Richards v. Knight*, 78 Iowa, 71; 2 *Jones on Mortgages*, sec. 1658; 1 *Pingree on Mortgages*, secs. 880-884.

Of course, in states, holding the view that the execution of the mortgage creates an estate in the land, the above rule is the law: *Jones v. Thomas*, 8 Blackf. 428; *Shepard v. Philbrick*, 2 Denio, 174; *Lane v. King*, 8 Wend. 585, 586; 24 Am. Dec. 105—three decisions rendered at a time when, in New York and Indiana, the execution of the mortgage conferred an estate in the land. In Indiana, the statute has been changed, and the mortgage put on ⁸⁰² the footing it had under our statute: See *Heavilon v. Farmers' Bank*, 81 Ind. 253, 254. The only decision we have seen to the contrary (in a state holding our doctrine as to mortgages and trust deeds) is *Cassilly v. Rhodes*, 12 Ohio, 95, 96, a decision elsewhere repudiated (as in *Downard v. Groff*, 40 Iowa, 599, and *Jones v. Thomas*, 8 Blackf. 428) and manifestly unsound. It seems to be held, in *Richards v. Knight*, 78 Iowa, 71,

that if the crops are matured when the sale is confirmed, and, as it is said, "no longer demanding nurture from the soil," they will pass to the purchaser from the mortgagor, though unsevered; but this is unsound, as is shown in *Beckman v. Sikes*, 35 Kan. 122.

It is said that the lessee or tenant of the mortgagee ought not to be required to pay more than the rent, and that the mortgagor, after condition broken, is a tenant at will to the mortgagee, and entitled to emblements, and ingress and egress to harvest them. But, under the law, even as it has been held in this state, and the above states holding our view of mortgages, this is not true. A tenancy at will is determinable at the will of either party, and, when the parties place themselves in that relation, the law attaches to the relation, from the uncertainty of the tenure, the right, on the part of a tenant required to move out in the middle of a crop season, to his growing crops. Both parties understand this, and enter into the particular relation with full knowledge of the tenant's right fixed by the law. But the mortgagor, after condition broken, holds as by his contract only, modified, it is true, by the statute making the mortgage a lien only. His right to the growing crops, part of the soil, is measured by his contract, and liable to be cut off by a sale and confirmation in pursuance of that contract, if not matured and severed before confirmation. This is well settled. In *Lane v. King*, 8 Wend. 585, 24 Am. Dec. 105, it is said, quoting from *Powell on Mortgages*, 213: "As to emblements, there is a distinction between tenants who have particular estates that are uncertain, defeasible by the act of the parties or by the act of God, and those who have particular estates uncertain, ³⁰³ defeasible by a title paramount; for, in the latter case, he that hath the right paramount shall have the emblements. The mortgagee, undoubtedly, as against the mortgagor and his grantees, has the paramount right."

And the court suggests, furthermore, in this case (page 585), that "there is no privity of contract or estate between the mortgagee and the purchaser of the interest of the mortgagor," saying such purchaser is a trespasser as to the mortgagee. In *Jones v. Thomas*, 8 Blackf. 428, this reasoning is noticed, but the court says the position is sound for a better reason, to wit, that "every person who takes under a mortgagor takes subject to all the rights of the mortgagee, unimpaired and unaffected. When, therefore," says the court, "a mortgagee obtains the absolute estate in fee of the mortgaged premises, by becoming the pur-

chaser under a foreclosure and sale, he is entitled to the emblements, and may maintain trespass against the mortgagor or his lessee for taking and carrying away the crops growing at the time of the sale, the title and interest of the mortgagor being subject to, and liable to be divested by, a sale and foreclosure of the mortgaged premises," citing many authorities.

And in *Beckman v. Sikes*, 35 Kan. 122, it is said: "The fact that the mortgagee sold the growing crop prior to the sale of land, does not vary the case, because he could not pass a title greater than his own; and therefore *Sikes* [the purchaser from the mortgagor] obtained no better right to the growing crop than *Baker* [the mortgagor] had or could give. Of course, the mortgage, as well as the decree of foreclosure, was only a lien upon the land, and conferred no title. The title and right of possession remained in the mortgagor until the sale and conveyance of the land. Until that time he was entitled to the use of the land, and to all the crops grown thereon that had ripened and were severed. The lien of the mortgage, however, attached to the growing crops until they were severed, as well as the land. The mortgagor planted the crop knowing that it was subject to the mortgage, ⁸⁰⁴ and liable to be divested by the foreclosure and sale of the premises. Anyone who purchased such crops from him took them subject to the same contingency, as the recorded mortgage and the decree of foreclosure were notice to him of the existence of the lien. If the land is not sold until the crops ripen and are severed, the vendee of the mortgagor would ordinarily get a good title; but if the land was sold and conveyed while the crop was still growing, and there was no reservation or waiver of the right to the crop at such sale, the title to the same would pass with the land," citing a multitude of authorities. And see 1 *Pingree on Mortgages*, secs. 880, 884.

The fact that *Carter* and the tenants in possession were not parties to the foreclosure suit—whatever effect that fact may otherwise have as to the remedy and the writs of assistance—does not alter the rights of the purchaser at the foreclosure sale, as against them. Those rights are just the same as if they had been parties, as clearly pointed out in *Downard v. Groff*, 40 Iowa, 598, 599.

Judgment reversed and cause remanded.

CROPS—RIGHT TO UPON FORECLOSURE SALE OF LAND.—The sale of land under a deed of trust carries with it the growing crops sown by the mortgagor: *Hayden v. Burkemper*, 101 Mo. 644; 20 Am. St. Rep. 643. As between a purchaser of land on a fore-

closure sale and the mortgagor's tenant, crops planted by the latter, and matured when the sheriff's deed is executed, although not severed, do not pass by the sale: *Hecht v. Dettman*, 56 Iowa, 679; 41 Am. Rep. 131, and note. The purchaser of mortgaged lands at foreclosure sale is not entitled to the ungathered crops as against a purchaser thereof from the mortgagor before the foreclosure: *Willis v. Moore*, 59 Tex. 628; 46 Am. Rep. 284. See extended note to *Crews v. Pendleton*, 19 Am. Dec. 753; *First Nat. Bank v. Beegle*, 52 Kan. 709; 39 Am. St. Rep. 365; *Monday v. O'Neill*, 44 Neb. 724; 48 Am. St. Rep. 760.

ROWZEE v. PIERCE.

[75 MISSISSIPPI, 346.]

DEDICATION TO PUBLIC USE—PRIVATE CITIZEN, WHEN MAY SUSTAIN SUIT TO PREVENT A CHANGE OF THE USE.—If municipal authorities are about to put property dedicated for use as an ornamental park to a different use, donors of such property, or any lot owner, and perhaps any private citizen, may maintain a suit to enjoin the proposed use.

MUNICIPAL CORPORATIONS—TITLE OF TO LANDS CONVEYED FOR A PUBLIC USE.—Where land is conveyed to a municipal corporation to be held only for public use as an ornamental park, subject to such regulations as it may make for fencing and ornamenting the same, keeping it in good order and preventing nuisances, it does not acquire an absolute title, and has no right to convey the land nor to put it to any use not consistent with that specified in the deed.

MUNICIPAL CORPORATIONS. — UNLAWFUL CHANGE OF A PUBLIC USE—WHAT IS.—If land is conveyed to a municipal corporation to be held only as an ornamental park, it has no right to erect a schoolhouse thereon.

IF A MUNICIPAL CORPORATION ABANDONS A USE FOR WHICH PROPERTY WAS CONVEYED to it, it does not thereby acquire a right to devote it to some other and inconsistent use. On the contrary, the property reverts to the original donors.

J. D. Fontaine, for the appellants.

Blair & Anderson, for the appellees.

⁸⁵³ **WHITFIELD, J.** The original bill in this case charged that on the twenty-fifth day of May, 1854, a deed was executed by the grantors therein to the president and selectmen of the town of Pontotoc, and their successors in office, to lots Nos. 20 and 21 in the southwest quarter of section 33, township 9, range 3 east, "only for ⁸⁵⁴ public use as an ornamental park, subject to such regulations as they may make for the purpose of fencing and ornamenting the same, and keeping the same in good order, and preventing nuisances for anything tending to subvert the before-declared object of the donors of money to purchase the same"; that said dedication was duly consummated by acceptance on

the part of the public authorities; that the board of mayor and aldermen of the town of Pontotoc are the successors in office of the said president and selectmen of the said town of Pontotoc; that the said board of mayor and aldermen of the town of Pontotoc declared the said town to be a separate school district; that the school building—the Pontotoc Male Academy—in which said separate school district school was taught, had been, on or about the twenty-eighth day of January, 1897, destroyed by fire; that the said board had contracted with one E. C. Pierce to erect another schoolhouse, and that said Pierce, instead of building said schoolhouse upon the site of the burned school building, or on land belonging to said Pontotoc Male Academy, had begun the construction of said building upon said lot No. 20, and he was doing this under the direction and with the consent and approbation of said board of mayor and aldermen; that complainants were lotholders within the corporate limits of the town of Pontotoc, without saying, however, whether their lots adjoined the public square or not; that the erection of said schoolhouse building upon said lots was putting them to a use other than that authorized by the terms of said deed of dedication, and was not consistent with or necessary to the principal use for which said dedication was made—that of an ornamental park only; that the erection of the said schoolhouse building upon said lots was a direct and palpable violation of the use for which said lots of land were dedicated; and prayed an injunction against said Pierce and the said board of mayor and aldermen of the town of Pontotoc to restrain them from erecting said buildings upon said lots, and using said lots for schoolhouse ⁸⁵⁵ purposes, and to enforce the proper use of said lots according to the terms of the deed dedicating them.

This bill was filed on behalf of complainants and other resident citizens of said town. Subsequently, the complainants asked leave to amend their bill, by making J. F. Wray and W. J. Rogers, two of the original donors of the purchase money of the land, parties complainant. The original bill further alleged that the dedication was made subject to “such regulations as the city authorities might make for the purpose of fencing and ornamenting the same, and keeping the same in good order, and preventing nuisances, or anything tending to subvert the before-declared object of the donors of money to purchase the same.” The language of the deed is as follows: “To have and to hold the aforesaid lots to the said party of the second part, and their successors in office, forever, but only for public use as an orna-

mental park, subject to such regulations as they may make for the purpose of fencing and ornamenting the same, and keeping the same in good order, and preventing nuisances, or anything tending to subvert the before-declared object of the donors of money to purchase the same."

The defendants demurred to the bill upon the grounds: 1. That the complainants failed to show that they would be injured in any way whatever, either as taxpayers, property owners, or citizens of said town, or otherwise, by the building of said school house, and that they did not show that the construction of said building would be a public injury; 2. That the bill showed that the building of said schoolhouse would not cause any injury, special or peculiar, to complainants, or any injury other than such as would be common to all the citizens of said town; 3. That the complainants had no right to institute the suit, but that it should be brought by the proper public official on behalf of all the citizens of said town; 4. That the bill showed that said lots had been abandoned for the purposes for which they were dedicated, and that the said town, therefore, had acquired the right to use them for any other legitimate purpose.

⁵⁵⁶ Affidavits were taken by both parties. The chancellor disallowed the amendment, sustained the demurrer, dissolved the injunction, and dismissed the bill.

It may be conceded that the preponderance of the testimony showed that the public school building was being erected on one corner of the square, upon a part of the ground considerably cut up by gullies, and which the city authorities, or Pierce, had had filled up to make a foundation for the building.

The bill in this case is not filed to abate a nuisance, either public or private. The cases of *Green v. Lake*, 54 Miss. 540, 28 Am. Rep. 378, and *Whitfield v. Rogers*, 26 Miss. 84, 59 Am. Dec. 244, are both inapplicable here. And the case of *Chicago v. Union Building Assn.*, 102 Ill. 379, 40 Am. Rep. 598, is also inapplicable, not being a bill filed on the line of the bill in the case at bar. Neither is this bill filed to enjoin the collection of taxes or of local charges. Cases of that character are also malapropos.

The amendment should have been allowed. And treating the bill as so amended, it would be one by the original complainants, and two of the original donors of the purchase money of the land dedicated to public use as an ornamental park alone, against the city authorities and the contractor, to restrain them from devoting the land dedicated to any other use than that named in the dedicating deed, and to secure to the town the very

use to which the owners of the property making the dedication declared it should be devoted. It is well settled that such a bill may be filed by such donors, as well as by the city authorities, and against the city authorities, restraining them from devoting the property to an inhibited use, when they themselves violate the trust by seeking to devote the land to any other than the declared use. And many authorities hold it may be maintained by any lotowner in the city: *Church v. Portland*, 18 Or. 73; 6 L. R. Ann. 259, and the exhaustive note thereto; *Daniel v. Jackoway*, 1 Freem. Ch. 59.

In the note at page 260, in 6 *Law Reports, Annotated*, it is said: "If the dedicated property be put to a use foreign to that contemplated by ⁸⁵⁷ the dedication, any property owner may inhibit such use": Citing many cases. And at page 262 the same doctrine is declared in the conclusion of the note, citing many other authorities: *Warren v. Mayor*, 22 Iowa, 351; *Board of Education v. Edson*, 18 Ohio St. 221, 98 Am. Dec. 114; 2 *Dillon on Municipal Corporations*, 4th ed., sec. 653, and the authorities in note 1, sec. 915. In this last section Mr. Dillon observes: "If the property of such a corporation be illegally or wrongfully interfered with, or its powers misused, ordinarily, the action to prevent and redress the wrong should be brought by and in the name of the corporation; but if the officers of the corporation are parties to the wrong, or if they will not discharge their duty, why may not any inhabitant . . . be allowed to maintain in behalf of all similarly situated a class suit, to prevent or avoid the illegal or wrongful act? Such a right is especially necessary in the case of municipal and public corporations, and if it be denied to exist, they are liable to be plundered, and the taxpayers and property holders, on whom the loss will eventually fall, are without effectual remedy": *Carter v. Portland*, 4 Or. 339; *Price v. Thompson*, 48 Mo. 361; *Commonwealth v. Rush*, 14 Pa. St. 186. In *Carter's* case it is said that "any lotholder of the city may proceed in equity to enforce the use according to the original dedication": Citing numerous authorities: *Briel v. Natchez*, 48 Miss. 439; *Rutherford v. Taylor*, 38 Mo. 315; *Le Clercq v. Gallipolis*, 7 Ohio, 217; 28 Am. Dec. 641; note to *Trask v. State*, 27 Am. Dec. 569, under the title "Changing the Use," where Mr. Freeman says: "Where property dedicated is put to a use other than that authorized by the terms of the dedication, then the dedicator, or any lotholder of the city, may proceed in equity to enforce the proper use": 5 Am. & Eng. Ency. of Law, 418, note 1, and the authorities.

It is said that the title is absolute in the city authorities. This is a mistake. It is not absolute in the sense that the city had the whole title, legal and equitable, and the right to dispose of the property as an owner in fee simple might; and cases like ⁸⁵⁹ Clark v. Providence, 16 R. I. 337, where cities had such complete title, and their disposition of property thereunder has been upheld, are not applicable here. This property, according to the terms of the dedicating deed, is held in trust "for use only as a public ornamental park." It is especially provided that it might be fenced, and the sole authority which the city had was to regulate the use marked out, not to change or alter it so as to put the land to a use wholly inconsistent with the one named by the dedicator. It may be true, as said in 5 American and English Encyclopedia of Law, page 417, note 4, that the land "might be put to any use consistent with the object of the dedication, and which would better adapt the premises to the particular use," but it is clearly settled by authority that the erection of a school-house building in a public square is not consistent with the use of the lot as an ornamental public square.

It is held in Rutherford v. Taylor, 38 Mo. 315, that buildings could not be erected in a public square, and in Board of Education v. Edson, 18 Ohio St. 221, 98 Am. Dec. 114, it is said: "The dedication in this case, as stated in the petition, was for school purposes, and on which to erect schoolhouses. Without determining whether, under this dedication, the lots could properly be used for school purposes, other than the erection of schoolhouses thereon, it is enough to say that the dedication is of the land, and not of its value or proceeds." And in the case of Church v. Portland, 18 Or. 73, it is held that ground dedicated for a public park could not be used for the purpose of erecting thereon a city hall, the court saying: "Using land to erect a public building thereon is not using it for ornamental purposes, however grand or magnificent the structure may be. It dedicates the land to a useful purpose, but it certainly is not using it for an ornamental one. The city of Portland is no mendicant, nor was it expected to be. It has always been able to buy necessary and suitable grounds upon which to erect its public buildings, and it should do so, and not attempt to encroach upon its public squares, which were clearly intended to be left open and unoccupied, for the health, comfort, ⁸⁶⁰ and recreation of its inhabitants. The argument of respondent's counsel, that the dedicators intended that the blocks might be ornamented with public buildings, if the city authorities should so determine, if main-

tained, would be liable to lead to absurd consequences. One set of city officials might hold to one policy and another set to a contrary one, and each act lawfully. The city authorities of to-day might determine that the blocks should be ornamented with public buildings, and proceed to erect them at a great expense, which would be entirely consistent with the intention of the dedicators. The city authorities of next year may conclude that the blocks should be ornamented only with walks, rustic seats, trees, grass, flowers, fountains, statues, and mementoes of heroic deeds, and, in order to carry out the latter mode of ornamentation, proceed to tear down the edifices erected by their predecessors, which would be equally consistent with the intention of the dedicators. I do not think that the court would be justified in adopting any such view. The rule in regard to property dedicated for public use, as laid down in 5 American and English Encyclopedia of Law, 417, 418, is as follows: 'Property dedicated to the public use may be said to be restricted to the use for which it is fairly intended to be dedicated, although this rule is construed to include such uses as are consistent with or necessary to the principal use. If dedicated property be put to a use foreign to that contemplated by the intention and purpose of dedication, then not only the dedicator, but any property holder, will have his remedy in equity to enforce the proper use, and inhibit an improper one.' That the blocks were intended to remain open plazas, and to be beautified and adorned by the hand of art, I do not think there can be any doubt. Spots of that character, especially in large cities, are highly important. They afford healthful and pleasant resorts in the heated season, and are, in fact the only places where a large class of the community are able to go and enjoy the blessings and comfort of shade and pure air, and any attempt, on the part of public officials, to appropriate them for ⁸⁰⁰ sites for public buildings, in which to conduct the economic affairs of the city, under any pretext whatever, would, as I view it, be a cruel effort to subvert a humane scheme."

So, in *Trustees etc. v. Mayor etc.*, 33 N. J. L. 13, 97 Am. Dec. 698, it is said: "The word 'square' on this plat of ground indicated a public use, either for purposes of a free passage or to be ornamented for grounds of pleasure, amusement, recreation, or health. That is the proper and settled meaning of the term in its ordinary and usual signification."

In *Commonwealth v. Rush*, 14 Pa. St. 186, the same meaning is given the word "square." So that it is clear that the terms

of this grant dedicated the ground to use as a public ornamental park alone, and that the word "park," *ex vi termini*, means a place to be kept open and ornamented for public uses, such as above indicated. It is also clear that the right to regulate the park, under this specific use, furnishes no right to change that use. But it is said again that this ground cannot be dedicated to the use of a park better than by erecting this building; that the construction of such a building is, on the doctrine of *cy pres*, appropriating it to the next best use in the nature of an ornamental public park; but the authorities above cited show that no such construction can be indulged on the facts in this case: *Board of Education v. Edson*, 18 Ohio St. 226; 98 Am. Dec. 114; *Church v. Portland*, 18 Or. 73; 2 *Perry on Trusts*, sec. 727; 2 *Pomeroy's Equity Jurisprudence*, sec. 1027.

In 2 *Perry on Trusts*, section 727, it is said: "From this review of the law, it appears that the object of all the rules upon this subject is to ascertain and carry out as fairly as may be the true intention of the donor. As thus explained, the doctrine of *cy pres* is only a liberal rule of construction to ascertain the intention. The intention of the donor is the point principally aimed at by all the courts."

Apply these principles here, and the inquiry would be, What was the intention of the donors at the time the dedication was made, in 1854? At that time it may well be supposed that this ^{was} town was prosperous. War had not ruined the town and destroyed its revenues, and the intention of the dedicators at the time the grant was made, was, doubtless, to keep open this place as a public ornamental park, for the uses indicated in the authorities cited, and it is not for the court, on account of changed conditions, due to civil convulsions, to substitute what the dedicators might now wish to be done, for the intention as it existed when the grant was made. It is said, also, that this property had been abandoned, and hence the city authorities might do as they pleased with it. This is not the law. If it had been abandoned, then the fee in the property reverted to the original donors, and not to the city.

In *Carter v. Portland*, 4 Or. 339, it is said that "the original owner, though he has the naked fee, has no right whatever to interfere in the premises, except where the use becomes absolutely impossible, or where the corporate authorities seek to put the premises to some other use than that to which they were originally dedicated." In *Briel v. Natchez*, 48 Miss. 438, it is said: "If the city had lost the easement by abandonment or

nonuser, Green or his heirs would take the property on the original title, discharged of the encumbrance of the servitude." In *Board of Education v. Edson*, 18 Ohio St. 226, 98 Am. Dec. 114, it is said: "Should the sole use to which the property was dedicated become impossible of execution, the property would revert to the dedicators or their representatives": Citing authorities.

It must thus be clear that none of the objections interposed by the demurrer are available as against a bill of this particular nature. It certainly cannot be impossible for the town of Pontotoc to raise funds with which to make this property a public ornamental park, as was originally intended. The town may not be able, and it might not be desirable, to incur any great expense toward this end; but surely the expense would be small which would be required to properly keep it in order, and use it as an open public ornamental park, devoted to the amusement, ⁸⁶² recreation, and health of the citizens. Neither can it be necessary that a public school building should be erected in the park. No reason is shown why it might not as well have been erected on the site of the original building. But however all this may be, it remains true, on principle and on authority, that the original donors dedicating this ground for a public ornamental park alone are entitled in equity to prohibit the city authorities, or anyone in conjunction with them, from devoting it to any other use than such as is clearly consistent with the purposes of the original grant.

Decree reversed, demurrer overruled, injunction reinstated, and cause remanded, with directions to allow the amendment, and proceed in accordance with this opinion.

DEDICATION — REVOCATION — REVERSION TO DONOR.—Dedication for one purpose does not justify use for another: *Bowen v. Delaware etc. R. R. Co.*, 153 N. Y. 476; 60 Am. St. Rep. 667; *Hemphill v. Boston*, 8 Cush. 195; 54 Am. Dec. 749. Property reverts to dedicators or their representatives, if the sole use to which it has been dedicated becomes impossible of execution: *Board of Education v. Edson*, 18 Ohio St. 221; 98 Am. Dec. 114; or if the use and enjoyment be relinquished or abandoned, or if there be a nonuser for a sufficient length of time to be evidence of a discontinuance and abandonment: *Gardiner v. Tisdale*, 2 Wis. 253; 60 Am. Dec. 407, and note; monographic notes to *State v. Trask*, 27 Am. Dec. 569, *Whitesides v. Green*, 57 Am. St. Rep. 749-762.

DEDICATION — CHANGE OF USE BY MUNICIPALITY—RIGHTS OF PUBLIC.—Proprietors of a town, after setting apart lands as a public square or common, cannot resume the lands so dedicated, or appropriate them to any other use, when individuals have been induced, by reason of the dedication, to purchase of them, lands bordering on such square or common in expectation that it will so remain: *Abbott v. Mills*, 8 Vt. 521; 23 Am. Dec. 222; *State v. Cat-*

lin, 3 Vt. 530; 23 Am. Dec. 230. A city cannot run streets through parks, or erect buildings therein, or divert a square to uses foreign to the dedication: See monographic note to State v. Trask, 27 Am. Dec. 569. A property owner in a town may maintain a suit to declare the title to a public square, and to have buildings erected thereon abated as nuisances: Brown v. Manning, 6 Ohio 298; 27 Am. Dec. 255; Le Clercq v. Trustees, 7 Ohio, pt. I, 217; 28 Am. Dec. 641, and note.

KOEN v. BRILL.

[75 MISSISSIPPI, 870.]

HOMESTEAD EXEMPTION.—The rule of marshalling securities does not apply to homestead exemptions. A mortgagee of real property, part of which is a homestead, will not be permitted nor required to resort to the homestead alone for the satisfaction of his lien.

HOMESTEAD.—AN INJUNCTION WILL ISSUE against the sale of a homestead under execution where it is so encumbered that no benefit can accrue therefrom to the creditor.

Booth, Anderson & Booth, for the appellants.

⁸⁷¹ TERRAL, J. The appellants obtained, in the court of a justice of the peace of Warren county, a judgment against the appellee for one hundred and ninety-six dollars and ninety-five cents, and levied the execution issued thereon upon the homestead of the appellee, a residence and lot in the city of Vicksburg, of the value of six thousand dollars. Appellee enjoined the sale of the premises, under the execution, on the alleged grounds that the homestead was encumbered by debts, with equitable liens to the amount of four thousand four hundred dollars, and that the sole effect of a sale of the premises, under the judgment, would be to "cast a cloud upon her title and destroy all her rights of homestead, and do her irreparable injury." The appellants demurred to the bill, and, the chancery court overruling their demurrer, they appeal to this court. The question is, whether the homestead is subject to sale under the circumstances stated and admitted in this case. Our statutes forbid the sale, under execution or attachment, of the exempt homestead, unless by its sale something could be realized for the substantial benefit of the execution creditor. Under the admitted facts of this case, it would be impossible for a ⁸⁷² sale to be of any advantage to the appellants; on the contrary, they could only incur additional costs, while the attempted sale and conveyance would be a gross wrong upon the appellee by clouding the title to her homestead.

We cannot think that the rule of marshaling securities applies

to homestead exemptions. Securities will not be marshaled, says Story, in his Equity Jurisprudence, section 642, where injustice will be suffered by the common debtor, and certainly it would be a gross injustice to the owner to allow the homestead to be diminished or possibly swept away entirely, because the owner has created some lien upon it.

The principles of law governing such cases are justly stated by Maxwell, J., in *Mitchelson v. Smith*, 28 Neb. 583, 26 Am. St. Rep. 357, where he said: "The homestead law is remedial in its character, and is to receive a liberal construction to carry into effect its beneficent provisions. No burdens will be placed on the homestead, therefore, not created by the parties themselves or by the law, as for taxes, nor will a mortgagee of real estate, a part of which constitutes the homestead, be permitted or required to resort to the homestead alone for the satisfaction of his lien, to the exclusion of the other real estate owned by the mortgagor, nor is the case one in which the securities can be marshaled."

Similar principles are announced in *Dickson v. Chorn*, 6 Iowa, 19, 71 Am. Dec. 382, which are cited and approved in *Hodges v. Hickey*, 67 Miss. 715.

Affirmed.

HOMESTEAD—EXEMPTION—MARSHALING SECURITIES.—Where a husband and wife execute a mortgage upon their homestead, and other real estate owned by the wife, and she afterward executes to another person a mortgage upon the same real estate except the homestead, in a suit to foreclose the mortgages, the first mortgagee will not be required to exhaust the fund derived from a sale of the homestead before resorting to the land covered by the second mortgage; the court has no authority to impose a greater burden upon the homestead than has been placed thereon by the parties themselves or by the law. This is not a case in which securities may be marshaled: *Mitchelson v. Smith*, 28 Neb. 583; 26 Am. St. Rep. 357, and note. See *Dickson v. Chorn*, 6 Iowa, 19; 71 Am. Dec. 382. See, also, monographic note to *Blue v. Blue*, 87 Am. Dec. 273-281, on the sale of homesteads under execution.

CASES
IN THE
SUPREME COURT
OF
MISSOURI.

CLARKSON v. HATTON.

[143 MISSOURI, 47.]

CHILDREN—ADOPTION OF.—The consent of the parents of a child is not necessary to its valid adoption by another, where the statute upon the subject is silent respecting the assent of the natural parents.

AN ADOPTED CHILD IS, IN A LEGAL SENSE, THE CHILD BOTH of its natural and of its adopting parents, and is entitled to inherit from each as their child.

AN ADOPTED CHILD IS NOT A BODILY HEIR.—Hence a conveyance to A. B. and his bodily heirs cannot, upon the death of A. B., vest any estate in his adopted child.

EJECTMENT.—RENTS AND PROFITS for a period prior to the commencement of an action of ejectment can be recovered only when it is shown that the defendant had knowledge of the plaintiff's claim.

Harry J. Cantwell, William N. Randolph, and James A. Booner, for the appellant.

Russell & Deal, for the respondents.

51 ROBINSON, J. This is an action of ejectment to recover possession of certain land in Mississippi county. The petition was in the usual form. The defense set up in the answer was that defendant is in possession as curator of the estate of Roy Conyers, a minor, who is averred to be the owner in fee of the land. A reply was filed denying the new matter contained in the answer. The cause was tried before the court without a jury, and resulted in a judgment for plaintiff, from which defendant appeals. The action was instituted on February 25, 1895, and tried at the ensuing April term of the Mississippi

county circuit court. It was admitted that Jabez Clarkson was the common source of title. On November 9, 1858, Jabez Clarkson conveyed the land in question by warranty deed to his son, John Clarkson, and his "bodily heirs." John Clarkson was in possession of the land at the time said deed was executed, and continued to reside thereon until 1890, at which time he died, leaving his wife, Sarah Clarkson, surviving, who died in 1894, prior to the commencement of this suit. John Clarkson had no children or their descendants living at the date of said deed, and none were born to him after that time. The plaintiffs are the only living brothers and sisters of John Clarkson. ⁵² Not having an heir born of his body, John Clarkson and his wife Sarah, on the eleventh day of July, 1887, by their deed duly executed, acknowledged, and recorded, adopted Roy Conyers, who survived them as their child and heir.

In the recent case of *Clarkson v. Clarkson*, 125 Mo. 381, this court held that the deed from Jabez Clarkson to John Clarkson created an estate tail, which our statute, *eo instanti*, converted into a life estate in John Clarkson, with remainder in fee to his children. Black, J., who wrote the opinion, after stating the facts, says: "On this state of facts the plaintiffs insist the title passed to them. The question must be determined by section 5, chapter 32, of the Revised Statutes of 1855, the statute in force when the deed was executed. It provides that any conveyance or devise which would have created an estate tail under the statute of 13 Edward I shall vest an estate for life only in such grantee or devisee, who shall possess and have the same power over, and right in, such premises, and no other, as tenants for life thereof would have by law; and upon the death of such grantee or devisee, the said land and tenements shall go and be vested in the children of such grantee or devisee, equally to be divided between them as tenements in common, in fee; and if any child be dead, the part which would have come to him or her shall go to his or her issue, and if there be no issue, then to his or her heirs. This statute disposed of the entire estate conveyed by the deed. It vested in John Clarkson a life estate and no more. And he had no children or their descendants living, either at the date of the deed or of his death, the remainder vested, according to the last clause of the statute just quoted, in his brother and sisters and the heirs of those who were dead, he having no father or mother living at his death."

⁵³ The statute then and now under consideration reads: "That from and after the passage of this act, where any conveyance or

devise shall be made whereby the grantee or devisee shall become seised, in law or equity, of such estate, in any lands or tenements as, under the statute of 13 Edward I (called the statute of entails) would have been held an estate in fee tail, every such conveyance or devise shall vest an estate for life only in such grantee or devisee who shall possess and have the same power over and right in such premises, and no other, as a tenant for life thereof would have by law; and upon the death of such grantee or devisee, the said lands and tenements shall go and be vested in the children of such grantee or devisee, equally, to be divided between them as tenants in common, in fee; and if there be only one child, then to that one, in fee; and if any child be dead, the part which would have come to him or her shall go to his or her issue; and if there be no issue, then to his or her heirs": 1 Rev. Stats. 1855, sec. 5, c. 32, p. 355.

The defendant contends that, as to the land in question, under the statutory estate so created, the remainder, after the death of John Clarkson, vested in Roy Conyers, the adopted child of John Clarkson, under the word "children" used in the statute above quoted, or the words "heirs" in the last clause of said section. The plaintiffs, however, claim, and the circuit court so held, following *Clarkson v. Clarkson*, 125 Mo. 381, that as John Clarkson had no children living at the time of his death, the remainder vested in his brothers and sisters and their descendants. It is objected further that this deed of adoption is not legal and valid because it does not appear that the father of the adopted child consented to such adoption. The statute under which the deed of adoption was executed ⁵⁴ provides: "If any person in this state shall desire to adopt any child or children, as his or her heir and devisee, it shall be lawful for such person to do the same by deed, which deed shall be executed, acknowledged, and recorded in the county of the residence of the person executing the same, as in the case of conveyance of real estate": Acts 1857, p. 59. No provision is made by the statute, in a case like the present, for the consent of the natural parents of the party sought to be adopted. It has been held by this court that neither the natural parents nor guardians of the child or children proposed to be adopted are required to join in the execution of the deed of adoption, or consent thereto in order to entitle the child to inherit from the adopted parents: *Reinders v. Koppelman*, 68 Mo. 482; 30 Am. Rep. 802; *In re Clements*, 78 Mo. 352. The case of *Luppie v. Winans*, 37 N. J. Eq. 245, relied upon by plaintiffs in support of their position, has no application here. The

statute of New Jersey expressly requires the consent of the parents to the act of adoption. Under the statutes of that state the act of adoption divests the natural parents of all control over the child so adopted. We are of opinion, therefore, that the adoption of Roy Conyers in this case was valid.

The next inquiry for our determination is, What are the rights of the adopted child? Can the adopted child in this case take property expressly limited to the "heirs of the body" of the parents by adoption? It is argued by counsel for plaintiffs that the decision by this court in *Clarkson v. Clarkson*, 125 Mo. 381, is decisive of that question. In the concluding paragraph of that opinion the court says: "The defendant makes the point that the adopted child of John and Sarah Clarkson was a child within the meaning of the statute, and ⁵⁸ hence the remainder passed to the adopted child. It is sufficient to say that no such question is presented by this record. The deed of adoption was excluded by the trial court on the objection of the plaintiffs, who are the appellants; the defendant took no appeal and is in no way complaining of any ruling of the trial court." The question whether the adopted child was within the provision of the statute was not in that case and not before the court. The court simply held, as the record in the case showed, that John Clarkson left no children, and, not having a father or mother living at the time of his death, the remainder vested in his brothers and sisters according to the last clause of the statute. The statute provides: "From the time of the filing of the deed with the recorder, the child or children adopted shall have the same rights against the person or persons executing the same for support and maintenance and for proper and humane treatment, as a child has by law against lawful parents; and such adopted child shall have, in all respects, and enjoy all such rights and privileges, as against the persons executing the deed of adoption. This provision shall not extended to other parties, but is wholly confined to parties executing the deed of adoption."

Adoption was unknown to the common law, being repugnant to its principles and the institution upon which it was builded, but was recognized by the civil law from its earliest day, and exists in this country by the statutes of every state, so far as we have had occasion to examine. The child becomes in a legal sense the child of the adopting parents; and at the same time remains the child of its natural parents, and is not deprived of its rights of inheritance from them, unless expressly so provided by statute: *Wagner v. Varner*, 50 Iowa, 534. In *Moran v. Stew-*

art, 122 Mo. 295, a construction was put upon this statute in conformity ⁵⁶ with this view. Upon this subject the court said: "This and other sections of the statute concerning the adoption of children have been before the court directly and indirectly on several occasions: *Reinders v. Koppelman*, 68 Mo. 482; 30 Am. Rep. 802; 94 Mo. 338; *Sharkey v. McDermott*, 91 Mo. 647; 60 Am. Rep. 270; *Davis v. Hendricks*, 99 Mo. 478; *Fosburgh v. Rogers*, 114 Mo. 122. The conclusion to be drawn from these cases, so far as they bear upon the question in hand, is this: The husband or wife, or both, may adopt a child as his, her or their heir, and the adopted child will inherit the same as if born of such adopting parents in lawful wedlock. For all purposes of inheritance from the adopting parent, the adopted child becomes and is the lawful child of such adopting parent." Such has been the generally accepted interpretation put upon the statute of adoption by the American courts.

By the act of adoption, Roy Conyers became the child and heir, in a certain sense, of John and Sarah Clarkson, but it does not follow that such adopted child takes the statutory estate created under the Revised Statutes of 1855, the statute in force when the deed in question was executed. The phrase "bodily heirs" is a well-established technical term, and is defined in *Anderson's Dictionary of Law*, 508, as "an heir begotten of the body; a lineal descendant." The words "children," "issue," and "heirs" are not synonymous terms. The rule of construction is, that technical words or phrases which have acquired a peculiar and appropriate meaning in law shall be construed according to such peculiar and appropriate meaning, unless it appears that the words were not used in their technical sense. When words and phrases have received a fixed legal interpretation by repeated decisions, such words and phrases, when employed in deeds or other written instruments, are to receive such fixed ⁵⁷ legal interpretation as a long line of decisions attached to them. In consequence of the application of this rule to the construction of the deed from Jabez to John Clarkson, it was held in *Clarkson v. Clarkson*, 125 Mo. 381, that John Clarkson only acquired a life estate. That the grantor therein named intended to use the term "bodily heirs" in its primary technical sense, there can be no doubt.

In *Reinders v. Koppelman*, 94 Mo. 338, it was held, in construing the provisions of a will in which the testator gave his wife a life estate in all his property, and at her death one-half the remainder to the nearest and lawful heirs of the testator and that of his wife, the testator and his wife each having brothers and

sisters living at the date of the will, that an adopted child was not entitled to inherit under the provisions of the will, but that the remainder went to the brothers and sisters of the testator's wife. Upon this subject the court said: "In common parlance we find the terms 'heirs at law' and 'lawful heirs' are used indiscriminately, as synonyms and convertible terms, and wherever either is used they are invariably referred to the heirs upon whom descent is cast by law, and not to an heir by adoption. The relation of an heir by adoption is an exceptional and unusual one, and does not come within the ordinary and usual meaning of the words 'lawful heirs,' and these words ought not to be held *ex vi termini* to include an adopted heir." In the concluding paragraph of the opinion, in speaking of the intention of the testator, the court remarked: "It is impossible to believe that he could have intended the child of a stranger manufactured into an heir by deed. The testator devised to his widow a life estate, the remainder to others; in that remainder she had no interest. She could neither convey it by deed nor devise it by will; she had no more power to convey it by deed ^{or} of adoption than by deed in any other form; that which she could not do directly she cannot be permitted to do indirectly."

When the statute of 1855, now under consideration, was passed, there was no law in this state authorizing the adoption of children, the adoption statutes not having been passed until some years later. The language of the statute shows that the legislature intended to use the words "children" or "heirs" in their primary technical sense, as lineal descendants when applied to "children" and as heirs upon whom the law cast the estate immediately on the death of the ancestor when applied to heirs, and that a child or heir by adoption was not contemplated. This is unquestionably in line with the drift of modern judicial thought. John Clarkson, having only a life estate in the premises in controversy, was powerless to convey the remainder by deed of adoption or by any other method known to law. If, then, he could not convey or in anywise dispose of the remainder, it would be illogical to say that by the contractual rights conferred by the deed of adoption he could convert a mere stranger into an heir, so as to work a result which was not in his power to effect by usual methods, and thereby change the descent and devolution of such remainder.

It was not in the power of John Clarkson to take away the statutory estate so created and vested in his brothers and sisters if he had no bodily heirs, and confer the same upon an adopted

child. The right to inherit by virtue of a deed of adoption does make the beneficiary a "bodily heir," a child in fact of the adopting parent or parents. In *Schafer v. Eneu*, 54 Pa. St. 304, it was held that the adopted children are not children of the persons by whom they have been adopted, and that the act of the legislature in passing ⁵⁹ the adoption statute did not attempt the impossible; the court saying: "Giving an adopted son the right to inherit does not make him a son in fact; he is so regarded in law only as to give him the right to inherit." In the case of *Keegan v. Geraghty*, 101 Ill. 26, Sheldon, J., in an opinion of that court, holding that an adopted child can take by descent only from the person adopting, and not from the lineal and collateral kindred of the adopting parent, uses this pertinent language: "We cannot admit this anomalous right here claimed in a stranger in blood, to take by descent in exclusion of kindred, to be given by any doubtful implication or vague generality of language. As against the adopted child the statute should be strictly construed, because it is in derogation of the general law of inheritance, which is founded on natural relationship, and is a rule of succession according to nature which has prevailed from time immemorial. Although the above-cited cases may differ somewhat in detail from the case at bar, yet the principles upon which they turn apply to and are decisive of it. We are therefore of the opinion that, as to the land in controversy, Roy Conyers is not to be deemed a child within the meaning of the act of 1855 above cited, and that the remainder does not pass to such adopted child. The authorities cited by counsel for defendant in support of their contention bear upon the right of the adopted child to inherit from the adopting parents, and do not affect the question in this case. In the view we have taken of the case involved in this record, the court committed no error in refusing defendant's first, second and third declarations of law.

But it is insisted that the court erred in refusing the seventh instruction asked in behalf of defendant, to the effect that the plaintiff was not entitled to recover rents and profits for any period preceding the commencement ⁶⁰ of this action. Under section 4638 of the Revised Statutes of 1889, plaintiff in ejectment is entitled to recover only rents and profits for a period previous to the commencement of an action, when it is shown on the trial that the defendant had knowledge of the plaintiff's claim prior to the commencement of the action.

It is conceded that there was no evidence of such knowledge

in this case. The law applicable to questions of this nature has been so often declared in favor of the contention of appellant that it is scarcely necessary to repeat it: See *Robidoux v. Casseleggi*, 81 Mo. 459, and cases cited. For the refusal to give plaintiffs' seventh instruction the case is reversed and remanded, with directions that judgment be entered in accordance with the views herein expressed, computing rents and profits from February 25, 1895, the date of the institution of this suit.

Brace, P. J., and Williams, J., concur.

ADOPTION—CONSENT OF PARENTS.—Adoption without the consent of the parents of a child may be valid under some circumstances: *Van Matre v. Sankey*, 148 Ill. 536; 39 Am. St. Rep. 196; and a statute rendering such consent unnecessary may be valid: *In re Williams*, 102 Cal. 79; 41 Am. St. Rep. 163. See *Nugent v. Powell*, 4 Wyo. 173; 62 Am. St. Rep. 17; monographic note to *Van Matre v. Sankey*, 39 Am. St. Rep. 221, 222.

ADOPTION—CAPACITY OF CHILD TO INHERIT.—An adopted child becomes entitled to succeed to the estate of its adopting parents to the same extent, and subject to the same contingencies and limitations as if it were a natural child: See monographic note to *Van Matre v. Sankey*, 39 Am. St. Rep. 223. At the same time it does not lose its right to inherit from its natural parents. In other words, it may be, and is the heir of both sets of parents: See monographic note to *In re Ingram*, 12 Am. St. Rep. 100. However, there are some purposes for which an adoption cannot be permitted to operate. Thus if property be devised to a woman for life, and upon her death is directed to be conveyed to her children and the heirs of her children forever, an adopted child is not within the meaning of this devise: See monographic note to *In re Ingram*, 12 Am. St. Rep. 100. The adoption of an illegitimate child by the father and his wife, under the statute, does not render such child his "issue" so as to defeat a remainder created by will, and made contingent upon his leaving no children: Note to *Warren v. Prescott*, 30 Am. St. Rep. 372.

EJECTMENT—RECOVERY OF RENTS AND PROFITS.—The computation of rent against a bona fide occupant should begin from the filing of the bill in ejectment, but against a mala fide possessor, from his entry, if within the period prescribed in the statute of limitations for actions for mesne profits: *Pugh v. Bell*, 2 T. B. Mon. 125; 15 Am. Dec. 142. The defendant is liable for rents and profits from the time that he had notice of the adverse claim: *Whitledge v. Wait*, Sneed. 335; 2 Am. Dec. 721, and note. See *Byers v. Fowler*, 12 Ark. 218; 54 Am. Dec. 271.

HOLKER v. HENNESSEY.

[143 MISSOURI, 80.]

GARNISHMENT.—INDEBTEDNESS IS NOT LIABLE to garnishment unless it is absolutely due as a money demand, unaffected by liens, prior encumbrances, or conditions of contract, and except in case of fraud, the creditor cannot claim any higher rights against his garnishee than the debtor could claim against him.

GARNISHMENT.—WHERE MONEYS ARE DEPOSITED with a third person to secure him from loss for becoming security on a bail bond, such moneys are not subject to garnishment on the ground that such bond is for some reason void. Its validity cannot be determined in the garnishment proceedings.

LIEN ON STOLEN MONEYS.—One whose moneys have been stolen and have been deposited by thieves with a third person, to secure him against loss for becoming surety on their appearance bond, has no lien on such moneys which may be enforced by garnishment.

Frank Griffin and W. W. Ramsay, for the appellant.

Gallatin Craig, for the respondent.

BRACE, P. J. The respondent Howendobler was summoned as garnishee in a suit by attachment instituted in the Nodaway circuit court by appellant Holker, against the defendants Hennessey, Green, et al. This is an appeal from a judgment of said circuit court sustaining a demurrer of the garnishee, Howendobler, to the reply of the plaintiff Holker to the garnishee's answer denying possession of any effects or credits of, or any indebtedness to, the defendants. By mistake the appeal was taken to the Kansas city court of appeals, and thence transferred to this court. Since the appeal the plaintiff has died, and the cause has been revived here in the name of his administratrix, Margaret M. Holker.

The facts stated in the reply, as epitomized in the brief of counsel for appellant, are as follows:

"1. That Ed Hennessey and John Green, with their codefendants in the attachment suit, were justly indebted to the appellant in the sum of \$5,233.33 for ⁸⁵ having on the thirteenth day of June, 1894, feloniously stolen that sum from appellant.

"2. That for the commission of said felony, said Hennessey and Green were, at the June term, 1894, of the Nodaway county circuit court, indicted, and for want of bail were committed to the jail of Nodaway county, then in charge and kept by one Benjamin F. Pixler, sheriff of said county.

"3. That at the date of their commitment the circuit court, by its order entered of record, fixed the amount of bail to be required of said Hennessey and said Green each severally at the sum of \$4,000.

"4. That on the thirteenth day of September, 1894, while the Honorable Cyrus A. Anthony, judge of said court, was absent from the county, the said Hennessey and Green, their codefendants in attachment, acting with them, in order to pro-

cure the release of said Green from custody, did deliver to and deposit with the garnishee, John M. Howendobler, and one Elmer Fraser, subject to the order of this garnishee, the sum of \$2,500, with the understanding that the same be paid back to Green on the release of Howendobler from liability upon recognition which they induced said Howendobler to then sign in the sum of \$2,500, said pretended bail bond being taken for said Green's appearance at the November term of said court, 1894.

"5. That on the twenty-fourth day of September, 1894, while the judge of said court was absent from the county, the said Hennessey and Green, their codefendants, acting with them, in order to procure the release from custody of said Hennessey, did deliver to and deposit with said garnishee the further sum of \$2,500 to induce said garnishee to sign another pretended bail bond for the appearance of said Hennessey at the November term, 1894, in the sum of \$2,500.

"6. That said pretended bail bonds were accepted by Sheriff Pixler, and said Hennessey and Green were released from bail on account thereof.

"7. That the money so left with the garnishee was left as indemnity against legal liability on account of the garnishee having signed said pretended bonds.

"8. That said pretended bail bonds were and are void and of no virtue and effect in law.

"9. That said Sheriff Pixler was without legal authority to receive, accept or approve said bonds or either of them.

"10. That no order of court, nor the judge thereof in vacation, nor the clerk thereof, authorized the making, taking or accepting of said bonds.

"11. That the amount of each of said bonds, to wit, \$2,500, was not indorsed upon the warrant of arrest or on the commitment upon which the said Green and said Hennessey were arrested and held.

"12. That by reason of the foregoing facts the garnishee has in his custody the sum of \$5,000 of the property of said Green and Hennessey and their codefendants in attachment, subject to this garnishment proceeding."

1. According to the allegations of the reply, the money was deposited with the garnishee to indemnify him against liability as surety on the bail bonds taken by the sheriff, by means of which the release of the said Hennessey and Green from the custody of the sheriff in which he was then held to answer an

indictment for a felony was procured. The only question raised by the demurrer is, whether the said Howendobler can be charged as garnishee as to the money so deposited, while the bail bonds thus given remain in such force as they had when they were taken, when the money was deposited, and when the garnishment was served.

It is settled law in this state, "in order that an ⁸⁷ indebtedness may be liable to garnishment, it must be shown to be absolutely due as a money demand, unaffected by liens or prior encumbrances or conditions of contract," and that except in cases of fraud, "the creditor can claim no higher rights against the garnishee than the debtor could claim against him": *Scales v. Southern Hotel Co.*, 37 Mo. 520; *Weil v. Tyler*, 38 Mo. 545; 90 Am. Dec. 441; *McPherson v. Atlantic etc. R. R. Co.*, 66 Mo. 103; *Fenton v. Block*, 10 Mo. App. 536. "The indebtedness, to be the subject of garnishment, must be certain, not depending upon contingency. There must be no condition precedent, no impediment of any sort between the garnishee's liability, and the defendant's right to be paid such as the attaching creditor himself cannot remove": *Mercantile Co. v. Bettles*, 58 Mo. App. 384; *Drake on Attachments*, sec. 551. In a recent excellent work on this subject the rule deduced from authorities cited from nearly all the states is thus stated: "Contingent liability on contract affords no ground for garnishment. So long as it is uncertain whether the garnishee owes the defendant, he cannot be charged, as the attaching creditor can have no greater right by subrogation than the defendant has directly against the garnishee. The rule that there can be no garnishment judgment on a conditional contract or contingent obligation is too well settled to require comment. Debt is different from attached property, which, under some circumstances, may be held until uncertain ownership has been settled": *Waples on Attachment and Guaranty*, 2d ed., sec. 373, p. 272. The facts stated in the reply fail to show a money demand absolutely due from the garnishee to the defendants in the attachment suit. On the contrary, it shows only a possible contingent liability, dependent upon a discharge of the conditions of the bond, or the release of Howendobler from any liability thereon in some other way. That has been so discharged or ⁸⁸ released is not contended, but the contention is, that the bond not having been taken in accordance with the requirements of the statute, no legal obligation for the penalty thereof was imposed upon the obligors. But that is a question that cannot be

determined in this case so as to protect the garnishee. That is a question between the obligee and the obligors on the bond, in the determination of which the judgment in this case would have no force: *Strauss v. Ayres*, 87 Mo. 348. It may turn out when that question comes to be investigated in a proper case between the proper parties that appellants' counsel may be mistaken in their views upon that subject, or if, perchance, the garnishee (the surety upon the bonds) should feel disposed in such a case to contest the validity of the bonds, and be successful, he would still be entitled to indemnity under his contract for the expense of such contest, his liability to the defendant being still contingent. The vice of appellant's argument is in assuming that these bonds are nullities and can be so declared in this action, neither of which propositions is true. It may be that the bonds are voidable and would be avoided in an action between the proper parties, but they are not nullities: *State v. Horn*, 94 Mo. 162, and cases cited; *Jones v. Gordon*, 82 Ga. 570. They were executed by the garnishee in good faith for a valuable consideration, moving directly to the defendants, and while as to their obligatory force, between him and those who received that consideration in whose shoes the creditor stands, there may be serious question (upon which we express no opinion), until that question is adjudicated and the surety's liability on the bonds conclusively determined, the defendants have no right of action against the surety on the contract in question and consequently their creditor has none by garnishment.

The contention that the plaintiff has a lien upon ^{so} the money deposited with the surety upon the bail bonds to indemnify him, which may be enforced by garnishment in the circumstances of this case, is ruled adversely to the plaintiff, on the authority of *Holker v. Hennessey*, 141 Mo. 527; 64 Am. St. Rep. 524.

The judgment of the circuit court is affirmed.

Robinson and Williams, JJ., concurring.

GARNISHMENT OF DEBT NOT YET DUE.—Demands which may be subjected to garnishment process are such only as the defendant in attachment could himself recover of the garnishee in an action of debt or indebitatus assumpsit: *Teague v. La Grand*, 85 Ala. 493; 7 Am. St. Rep. 64; *Hoyt v. Swift*, 13 Vt. 129; 37 Am. Dec. 586. Garnishment of an amount due defendant for work is premature when made before the work is completed: *Williams v. Androscoggin etc. R. R. Co.*, 36 Me. 201; 58 Am. Dec. 742; *Brewer v. Smith*, 8 Greenl. 44; 14 Am. Dec. 213. See *Davis v. Eppinger*, 18 Cal. 378;

79 Am. Dec. 184. For a contrary doctrine, see *Phenix Ins. Co. v. Willis*, 70 Tex. 12; 8 Am. St. Rep. 566; *Mims v. West*, 88 Ga. 18; 95 Am. Dec. 879.

HAGGERTY v. ST. LOUIS ICE MANUFACTURING AND STORAGE COMPANY.

[143 MISSOURI, 238.]

CRIMINAL LAW—MISDEMEANORS.—INTENT constitutes no element of the crime of misdemeanor. Hence innocence of intention does not entitle one accused of a misdemeanor to an acquittal if he has committed acts constituting a misdemeanor.

GAME LAWS—KEEPING GAME KILLED IN THE OPEN SEASON AFTER THE END THEREOF.—A statute making it a misdemeanor for any person to have in his possession any game birds or animals, or any flesh, pieces or parts thereof, during the season when the catching or killing thereof is prohibited, applies to such birds or animals, or any part thereof, though killed within the open season.

CONTRACT VOID BECAUSE FOR THE COMMISSION OF A MISDEMEANOR.—A contract between a person having carcasses of game birds or animals in his possession in the open season with a storage company to keep the same through the closed season, where such keeping is a misdemeanor, is void, and therefore damages cannot be recovered for a violation of the contract or for negligence in its performance.

R. H. Kern, for the appellants.

Henry E. Mills, for the respondent.

SHERWOOD, J. The business of plaintiffs, resident in St. Louis, was that of dealers in game, while the defendant corporation was engaged in that city in the business of "cold storage," which embraced the storing and preservation of produce and game of all kinds.

Plaintiffs, during what is known as the "open season," were accustomed to buy and sell the different kinds of game, and, when what is known as the "closed season" was about to arrive, were in the habit of storing such game as remained on their hands until such time as the "open season" again returned, when they would resume their erstwhile prohibited business. So it was that in the year 1892, between the 15th of November and the 26th of December, the defendant corporation made plaintiffs an offer to carefully store and preserve the same in a cold, frozen condition for such time as plaintiffs might store the same with it, and to restore the same to plaintiffs in as good condition as when received from plaintiffs. This offer was based upon the consideration of the payment of so much

per pound for such storage. Plaintiffs desiring that such game be so kept and preserved, and intending that such game should be stored with defendant corporation during the "closed season," and withdrawing it when the "open season" should return, ²⁴² accepted the offer aforesaid, and on the 18th of November, 1892, stored with defendant a large quantity of game, to be withdrawn from defendant's custody when and at such times as the law would permit plaintiffs to dispose of the same. At the time of its being thus stored, the game was in good condition. On November 18, 1893, defendant presented to plaintiffs a bill for such storage, amounting, et cetera, which plaintiffs paid. Thereupon plaintiffs proceeded to remove such game from the cold storage rooms of defendant, and in doing so discovered that defendant had failed to preserve such game in a cold and frozen condition, whereby the same became rotten and worthless, and was not in good condition, as when delivered to defendant. For this breach of contract damages in the sum of seven thousand dollars was demanded, and, being refused, this suit was brought. This is the substance of the first count in the petition; the second count is like unto it.

Defendant demurred to the first count on these grounds: "Now comes defendant and demurs to the first count of plaintiffs' second amended petition, for the reason that it does not state a cause of action against defendant, and because it does show affirmatively that plaintiffs endeavored to make with defendant a contract for the storage of game during the period of the year when the possession of such game was prohibited by law, and that the alleged contract was unlawful and in violation of a penal statute of the state of Missouri and nonenforceable, and because it appears that at plaintiffs' request said game was carried on plaintiffs' account during the season of 1893, prohibited by law." The trial court adjudged the petition insufficient in law, and, plaintiffs declining to plead further, final judgment was rendered, hence this appeal.

²⁴³ Section 3901 of the Revised Statutes of 1889 prohibits the killing of certain game at certain times of the year. Section 3902 of the Revised Statutes of 1889 makes it a misdemeanor for any person to "purchase, have in his possession or sell any of the game birds or animals specified in the next preceding section, or any flesh pieces or parts of said animals, during the season when the catching and killing of same is prohibited, or shall purchase, have in possession, or sell any of the

game birds or animals caught or killed contrary to the provisions of said sections."

As shown by the very interesting and exhaustive opinion of Mr. Justice White in *Geer v. Connecticut*, 161 U. S. 519, "from the earliest traditions the right to reduce animals *ferae naturae* to possession has been subject to the control of the law-giving power." The exercise of this power has been definitely traced back even as far as the time of Solon, who forbade the Athenians to kill game. And in France, as early as the Salic law, the right to reduce a part of the common property in game to possession and consequent ownership was regulated by law. Such regulations prevailed in every country in continental Europe and in England. Treating of this subject, Blackstone says: "There still remains another species of prerogative property, founded upon a very different principle from any that have been mentioned before; the property of such animals *ferae naturae*, as are known by the denomination of game, with the right of pursuing, taking, and destroying them; which is vested in the king alone and from him derived to such of his subjects as have received the grants of a chase, a park, a free warren or free fishery. . . . In the first place, then, we have already shown, and indeed it cannot be denied, that by the law of nature every man from the prince to the peasant has an equal right of pursuing and taking to his own use all such creatures as are ²⁴⁴ *ferae naturae*, and therefore the property of nobody, but liable to be seized by the first occupant, and so held by the imperial law even so late as Justinian's time. . . . But it follows from the very end and constitution of society that this natural right, as well as many others belonging to a man as an individual, may be restrained by positive laws enacted for reasons of state or for the supposed benefit of the community": 2 Blackstone's Commentaries, 410. This prerogative of the king as an attribute of government recognized and enforced by the common law of England by appropriate and oftentimes by severe penalties and forfeitures, was vested in the colonial governments of this country, and when these governments threw off the yoke of the mother country, that right of sovereignty passed to and was vested in the respective states. This sovereign attribute and power as existent in the states of this Union has often been exercised by them by passage of laws in the most of these states, for the protection and preservation of game; and it seems never to have been called in question. Numerous adjudications attest this fact. In such cases, the

common ownership of game, which otherwise would remain in the body of the people, is lodged in the state, to be exercised like all other governmental powers in the state in its sovereign capacity, to be exercised in trust for the benefit of the people and subject, of course, to such regulations and restrictions as the sovereign power may see fit to impose. Such regulations appropriately fall within the domain of the police power of the state.

In *ex parte Maier*, 103 Cal. 476, 42 Am. St. Rep. 129, it is said: "The wild game within a state belongs to the people in their collective, sovereign capacity. It is not the subject of private ownership, except in so far as the people may elect to make it so; and they may, if they see fit, absolutely ²⁴⁵ prohibit the taking of it, or traffic or commerce in it if deemed necessary for its protection or the preservation of the public good." Expressing the same view, it is said by the supreme court of Minnesota: "We take it to be the correct doctrine in this country that the ownership of wild animals, so far as they are capable of ownership, is in the state, not as a proprietor but in its sovereign capacity as the representative and for the benefit of all its people in common": *State v. Rodman*, 58 Minn. 393. In *Magner v. People*, 97 Ill. 320, in passing upon the subject now under consideration, it is said: "Stated in other language, to hunt and kill game is a boon or privilege, granted either expressly or impliedly by the sovereign authority—not a right inherent in each individual, and consequently nothing is taken away from the individual when he is denied the privilege at stated seasons of hunting and killing game. It is, perhaps, accurate to say that the ownership of the sovereign authority is in trust for all the people of the state, and hence by implication it is the duty of the legislature to enact such laws as will best preserve the subject of the trust and secure its beneficial use in the future to the people of the state. But in any view, the question of individual enjoyment is one of public policy and not of private right."

This right of the states to provide and enforce regulations respecting the protection and preservation of game has received frequent recognition at the hands of the supreme court of the United States, thus: In *McCready v. Virginia*, 94 U. S. 395, the power of the state of Virginia to prohibit citizens of other states from planting oysters within the tide waters of that state was upheld by this court. In *Manchester v. Massachusetts*, 139 U. S. 240, the authority of the state of Massachusetts to con-

trol and regulate the catching of fish within the bays of that state was also maintained: See, ²⁴⁶ also, *Geer v. Connecticut*, 161 U. S. 519, and *State v. Farrell*, 23 Mo. App. 176, and cases cited; *State v. Lewis*, 134 Ind. 250.

A statute of New York prohibited the killing or having in possession game birds of the kinds specified, after the first of March (Laws 1871, c. 721, pp. 1671, 1677, secs. 7, 8, 33), and touching this statute, the court of appeals of that state observed: "It is admitted in this case that the defendant had possession of game after the 1st of March, and the fact alleged, that it was either killed within the lawful period or brought from another state where the killing was lawful, constitutes no defense. The penalty is denounced against the selling or possession after that time, irrespective of the time or place of killing. The additional fact alleged, that the defendant had invented a process of keeping game from one lawful period to another, is not provided for in the act, and is immaterial," and the validity of the statute was upheld: *Phelps v. Racey*, 60 N. Y. 10; 19 Am. Rep. 140. That case is directly in point, and fully sustained the action of the trial court in adjudging the petition insufficient.

Plaintiffs in their petition, when speaking of their purpose in preserving such game, say, in substance, that they intended that said game should be stored with defendant corporation during the "closed season," and withdrawn upon return of the "open season." The offense prohibited by section 3902 is a misdemeanor, and in such case the intention of the misdemeanor cuts no figure in the case, since in that class of crimes intention constitutes no element of the offense. It is the act done and that alone which violates the law, and the motive which prompts the violation is altogether dehors the crime committed. This point is illustrated by various adjudications respecting the sale of liquors to minors and the marriage of minors supposing the parties in ²⁴⁷ each case to be of age, et cetera: 1 Wharton on Criminal Law, 9th ed., sec. 23 a, p. 35; sec. 88, pp. 113, 115, and cases cited; *Howell v. Stewart*, 54 Mo. 404.

In this case, the statute makes no exceptions to the rigid rule which it prescribes. The acts therein mentioned are unconditionally and absolutely forbidden, and this is so because the legislature doubtless thought that the best way of accomplishing the result they desired and the only means of attaining it. They therefore resorted to arbitrary prohibition. Had

scienter been required by the statute, its very object would have been defeated, as scienter would be in the majority of instances impossible of proof: 1 Wharton on Criminal Law, 9th ed., sec. 88, p. 117.

It was to prevent the easy evasions of the statute that the law was passed in its present shape. And on this ground it is analogous to statutes prohibiting the manufacture or sale of oleomargarine (*State v. Bockstruck*, 136 Mo. 335), and it is the only ground upon which such enactments can be upheld. The end being granted, to wit, the power of the legislature to enact a law for the protection and preservation of game; the means to effectuate that end, to wit, the authority to prevent the law thus passed from being evaded by prohibiting and making penal the possession of game after a certain period, follows as an indubitable corollary: *Ex parte Marmaduke*, 91 Mo. 262, 60 Am. Rep. 250, and cases cited.

Recurring to the petition, it shows on its face that plaintiffs contracted with defendant corporation for the commission of a misdemeanor. It is true the offense is but *malum prohibitum*, but the consequences are the same as if the act were *malum in se*, since in principle there is nothing which should cause the result to differ in the former case from the latter. The law will not stultify itself by promoting on the one hand what ²⁴⁸ it prohibits on the other, and will for this reason leave the parties to this suit where it finds them, unsanctioned by its favor and unaided by its process: *Kitchen v. Greenabaum*, 61 Mo. 110.

Therefore the doctrine announced in *Sprague v. Rooney*, 104 Mo. 360 (overruling the former decision in same case, in which was a dissent) applies here, and hence judgment affirmed.

All concur.

GAME LAWS—GAME KILLED DURING OPEN SEASON BUT KEPT AFTER EXPIRATION THEREOF.—The holding of the principal case is opposed by the construction put upon Oregon statutes providing for a close season with respect to certain fish. Precisely the same question was presented to the Oregon court as that in the principal case, namely, does the statute prohibit a person having in his possession or offering for sale during the close seasons named in the act, fish of the varieties mentioned, which were caught in any of the rivers enumerated during their open seasons? It was held that to support a conviction it must appear that the fish were caught in the close season as well as held in possession: Extended note to *Ex parte Maier*, 42 Am. St. Rep. 189-144, on game laws. Compare *Phelps v. Racey*, 60 N. Y. 10; 19 Am. Rep. 140.

CRIMINAL LAW—CRIMINAL INTENT.—Whether or not a criminal intent or guilty knowledge is a necessary element of a statutory offense is a matter of construction to be determined from the language of the statute in view of its manifest purpose and design:

Commonwealth v. Weiss, 139 Pa. St. 247; 23 Am. St. Rep. 182, and note; State v. Zichfield, 23 Nev. 304; 62 Am. St. Rep. 800.

CONTRACTS IN VIOLATION OF PENAL STATUTE.—No rights can spring from, or be rested upon an act in the performance of which a criminal penalty is incurred, and all contracts which are made in violation of a penal statute are absolutely void and cannot be recovered upon: Youngblood v. Birmingham Trust etc. Co., 95 Ala. 521; 36 Am. St. Rep. 245, and note.

STATE v. SWITZLER.

[143 MISSOURI, 287.]

A TAX CAN BE LEVIED FOR A PUBLIC PURPOSE ONLY, and never for private objects or purposes.

A SUCCESSION OR COLLATERAL INHERITANCE TAX is subject to the rule that taxes can be levied only for a public purpose.

TAXES—WHEN DEEMED TO BE FOR A PUBLIC PURPOSE—USAGE.—In deciding whether a tax has been levied for a public purpose, courts must be governed mainly by the course and usage of the government, the objects for which taxes have been customarily and by long course of legislation levied, as distinguished from objects which, by like usage, are left to private inclination, interest, or liberality.

TAXES TO PROVIDE FOR FREE SCHOLARSHIPS.—A statute imposing a succession tax and providing that the proceeds thereof shall be appropriated for establishing and maintaining free scholarships in the state university, that the persons admitted to such scholarship shall pass a written examination, and be dependent upon their own exertions, and financially unable to obtain their education, and that there shall be paid to them in monthly installments while attending the university the sum provided by the scholarship for defraying expenses of attendance, provides for a tax for a private purpose, and is therefore unconstitutional and void.

STATUTES—OPERATION OF MUST BE PROSPECTIVE.—Where there is a statute imposing a succession tax enacted before the death of the decedent and another enacted afterward, the former controls.

A SUCCESSION TAX IS AN EXCISE OR DUTY upon the right of a person or corporation to receive property by devise or inheritance from another. It is a burden on each person claiming succession, measured by the value of his interest and collectible out of his interest only.

A SUCCESSION TAX—WHAT IS NOT.—A tax levied on the whole estate of a decedent is not a succession tax, but a tax directly upon property, and to be sustainable, must be uniform.

A SUCCESSION TAX MUST BE UNIFORM as to persons of the same class. One person cannot be charged a greater percentage on his legacy than another person in the same class, because the amount of his legacy is greater than that of the latter. A statute imposing a charge of five per cent for legacies of ten thousand dollars, and where legacies are above that sum, five per cent on the first ten thousand dollars, and twelve and a half per cent on the balance, is therefore void for want of uniformity.

Turner & Hinton, C. B. Sebastian, W. M. Williams, Silas B. Jones, M. F. Watts, and L. F. Parker, for the relators.

Frank U. Estes, amicus curiae, William J. Stone, G. S. Hoss, D. C. Reeves, and Judson & Taussig, for the respondents.

²⁰⁷ GANTT, C. J. This is an original proceeding in this court for a writ of certiorari to the judge of the ²⁰⁸ probate court of Boone county commanding him to send up the record of his proceedings in the matter of the assessment and levy of a collateral succession tax upon the estate of John C. Conley, late of said county, deceased. The writ was issued and made returnable to division No. 2 of this court, but owing to the importance of the questions involved and the fact that a similar writ had also been issued upon the application of L. R. Wilfley, executor of Susan E. Spear, against Judge Rassieur, judge of the probate court of the city of St. Louis, returnable to the court in Bank, this cause was transferred to court in Bank, and the records of the probate court in each case having been removed into this court, the two cases were heard together upon a motion to quash the proceedings for want of jurisdiction in said courts to assess and levy said collateral succession tax.

John C. Conley died in Boone county, Missouri, on the sixth day of December, 1896, leaving an estate consisting of realty in this and other states and of bonds, notes, certificates of stock, and other securities. His will, dated February 18, 1896, was duly established and admitted to probate by the probate court of Boone county on the 7th of December, 1896. The said testator was never married. He made a bequest of \$20,000 for charitable purposes and gave the remainder of his estate in different amounts to his collateral relatives. He gave some special legacies of a certain amount, and, after the payment of various special bequests, the residue of the estate is given by his will to certain nephews and nieces named in the residuary clause. Letters testamentary were duly issued to the relators, who qualified as executors of the will on the 15th of December, 1896, and filed their inventory on the 11th of January, 1897.

The probate court on the 30th of August, ²⁰⁹ 1897, entered an order of record, reciting the death of said John C. Conley and the probating of his will, and setting out the terms thereof, the date of letters testamentary and of the filing of the inventory, and over the protest of the relators (who waived formal notice of the proceedings, but objected to the right of the court to make such assessment), proceeded to fix the value of said estate, for the purposes of the collateral succession tax, under the act of April 1, 1895, and the amendatory acts of 1897.

The court found that the sum of \$20,000 was given by the will to trustees for charitable purposes; \$18,391.31 of the estate will be required to pay the debts of the testator (so far as appeared up to date of that order), and other legal demands; that the real estate in the state of Missouri was of the value of \$45,660, and that the personal property of the estate was of the value of \$182,919.34, making a total valuation of \$228,579.34. The court deducted from this amount, the sum of \$20,000 given for charitable purposes, and \$18,391.34 required to pay debts and expenses of the administration, and held and determined that the clear market value of all of said property, subject to such tax, was \$190,188; and that said amount was subject to the payment of a collateral succession tax of \$5 for each and every \$100 of such sum up to \$10,000, and \$12.50 for every \$100 in value in excess of said sum of \$10,000. Eighty-five shares of stock in the bank of Hico, Texas, of the par value of \$8,925 was included in the above valuation. The court then levied and charged said estate with a total tax of \$23,023.50 and ordered the executors to pay the same. All these facts appear upon the face of the record of the probate court. A similar state of facts exists as to the tax on Susan E. Spear's estate, in all material respects.

The constitutionality of the act of the general ^{31st} assembly of Missouri entitled, "An act providing for the endowment of the state university, and for the establishment and endowment of free scholarships of merit therein in each county," approved, April 1, 1895, and of an act of the general assembly entitled, "An act to amend an act passed by the thirty-eighth general assembly of the state of Missouri entitled, 'An act providing for the endowment of the state university and for the endowment of free scholarships of merit therein in each county,' by adding a new section after section 1 of said act, to be numbered section 1a, which new section shall read as follows," approved March 16, 1897, is directly assailed in and by these proceedings. The proposition of relators is, that both the act of April 1, 1895, and the amendatory act of March 16, 1897, are void because in conflict with various provisions of the constitution of Missouri and the fourteenth amendment to the constitution of the United States.

No question is raised as to the power of this court by certiorari to supervise the proceedings in the probate courts, and if their action in levying said taxes is found to be in excess of

their powers, to quash their proceedings, and we have no doubt of our powers to do so.

At the risk of being deemed prolix, we will insert so much of the acts as bear directly upon the questions raised. The act was passed in 1895, and amended by two acts passed in 1897. As amended it provides, among other things, as follows:

"Sec. 1. That all property conveyed by will, or by the death of an intestate, to any person other than the father, mother, husband, wife, or direct lineal descendant of the testator or intestate, except property conveyed for some educational, charitable, or religious purpose exclusively, shall be subject to the payment³¹¹ of a collateral succession tax of \$5 for each and every \$100 of the clear market value of such property.

"Sec. 2. That in addition to the fees now provided by law no corporation shall be organized under the laws of this state, and no foreign corporation shall do business in this state, unless the incorporators shall, upon filing the articles of association, pay to the state treasurer, in trust for the state of Missouri, to be disposed of as hereinafter provided in this act, the sum of twenty-five hundredths of a dollar for every thousand dollars of the capital stock of such corporation as a franchise fee; and a like franchise fee shall be paid in the same manner on every thousand dollars of the increase of the capital stock of any corporation.

"Sec. 3. That every manufacturer of patent medicines shall annually pay a license tax of twenty-five dollars.

"Sec. 4. That all moneys which may hereafter escheat to the state shall be distributed in the manner provided by this act.

"Sec. 5. That all taxes, fees, or moneys received under this act by any county official shall be paid during the first week of the following month to the county treasurer, who shall credit three-fourths to a fund hereby created to be known as 'The State University Scholarship Fund,' and remit the remaining one-fourth to the state treasurer; and from all money received directly by the state treasurer under this act, he shall monthly reserve one-fourth and remit the remaining three-fourths to all the county treasurers of the state, to be credited to 'The State University Scholarship Fund' of such counties.

"Sec. 6. That all moneys received by the state treasurer to be retained by him under this act shall be deposited in the state treasury to the credit of the 'seminary fund' as provided by law.

³¹² "Sec. 7. That all moneys received by the county treas-

urer of each county to be credited to 'The State University Scholarship Fund' shall be forever kept and preserved as a sacred permanent fund, and shall be invested and loaned in the manner provided in this act."

Sections 8, 9, and 10 of the act are in the following words:

"Sec. 8. The income of the moneys in 'The State University Scholarship Fund' shall be collected annually, and one-fourth of the same added to the principal, and the remaining three-fourths shall be faithfully appropriated for establishing and maintaining free scholarships in the state university, the amounts and terms of which shall be fixed and changed from time to time, as may be necessary, on the written order and resolution of the board of curators of the state university.

"Sec. 9. On the first week of August of each year, beginning with the first Monday after due notice thereof, as prescribed by the county court, in two newspapers of each county, representing different political parties where such newspapers exist, there shall be held at the courthouse in the county seat, an examination of all applicants qualified under the law to be students of the university. Such applicants shall be actual residents of the county, and such examinations shall be conducted by three examiners, one of whom shall first be appointed by written notice to the county clerk by the president of the board of curators of the university during the month of July, and one selected thereafter by the county court of another political faith, and the third selected by the agreement of the two so chosen, with power in the county court, or the presiding judge thereof in vacation, to fill all the vacancies in the position of examiner; and such examination shall be written, ^{§13} and shall meet the requirements for entrance in the academic department of the university; provided, that the duties imposed on county courts or the judges thereof, by this section, shall be discharged in the city of St. Louis by the mayor.

"Sec. 10. Those applicants passing the best and most meritorious examinations, to the number of scholarships established in each respective county, shall be awarded such scholarships, and be entitled thereon to enter free of matriculation fees, any department, school, or college of the university, and have paid to them in equal monthly installments while attending the university, the sum provided by the scholarship so awarded, for defraying the expenses of such attendance; provided, that no applicant shall be qualified to receive such scholarship unless such examiners shall be satisfied that the applicant is dependent

upon his own exertions for his education, and financially unable to otherwise obtain the same."

By comparison of the act thus revised and amended in 1897 with the original act of 1895, it will be seen that the progressive feature of the original act, to wit, the increase of seven and one-half per cent on amounts of over \$10,000, is repealed and specific provision is added for valuation of inheritances and enforcing the collection of the tax. Amendments are also made to sections 2 and 3 in matters not material in the present proceeding, while in section 5, the distribution of the funds collected by the state treasurer in trust under the provisions of the act is so regulated that it is made in the different counties on the basis of representation in the general assembly.

Lying at the threshold of this discussion is the objection which goes to the very substance of this enactment. It is insisted that the tax provided in the act is not levied for a public purpose within the meaning ³¹⁴ of section 3 of article 10 of the constitution of Missouri, which ordains that "taxes may be levied and collected for public purposes only." This provision of our constitution accords with the definition of a tax as expounded by the courts and law-writers of this country. Judge Cooley in his work on Constitutional Limitations, page 587, says: "Taxes are burdens or charges imposed by the legislature upon persons or property to raise money for public purposes." Judge Coulter, in *Northern Liberties v. St. John's Church*, 13 Pa. St. 104, said: "I think the common mind has everywhere taken in the understanding that taxes are a public imposition, levied by authority of the government for the purpose of carrying on the government in all its machinery and operations, that they are imposed for a public purpose." The supreme court of the United States in *Loan Assn. v. Topeka*, 20 Wall. 655, in a luminous opinion by Judge Miller, after a review of the authorities and a discussion of the power to tax, laid it down as an established principle that "beyond cavil there can be no lawful tax which is not laid for a public purpose." In the *Matter of Mayor of New York*, 11 Johns. 80, the court said: "The word 'taxes' means burdens, charges of impositions put or set upon persons or property for public uses, and this is the definition which Lord Coke gives to the word 'talliage' (2 Coke's Institutes, 532), and Lord Holt in *Carth.* 488, gives the same definition in substance of the word 'tax.'" Chief Justice Appleton, in *Allen v. Jay*, 60 Me. 124, 11 Am. Rep. 185, says: "A tax is a sum of money assessed under the authority of the state on

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the person or property of an individual for the use of the state. Taxation, by the very meaning of the term, implies the raising of money for public use and excludes the raising if for private objects and purposes." Judge Jere Black, in *Sharpless v. Mayor*, 21 Pa. St. 167, 59 Am. Dec. 759, says: "I concede that a law authorizing ^{§15} taxation for any other than a public purpose is void." We construe section 3 of article 10 of our constitution as a direct inhibition upon the general assembly to levy a tax for a private purpose, or for the benefit of any private individual. The language used is not susceptible of any other construction.

We shall assume without further comment that if the act under review authorizes the levy of a tax, that tax must be for a public purpose, otherwise it is a direct violation of the constitution of this state. Does it authorize a tax? The learned counsel of the probate judges argues that it is not strictly a tax. He says: "Although called a tax, it is not properly so, but a bonus or price exacted from the collateral kindred and strangers to the blood as the condition upon which they take the estate whose owner is dead." But even if such a distinction can be maintained, the contention does not reach the vital point upon which the relators insist, namely, that by whatever name this burden, or excise, tax, bonus, or exaction from the citizen, may be called, still it falls within the purview of the word "taxes" as used in the third section of article 10 of our constitution. The word in that section is used in its generic sense as expounded by lexicographers, judges, and lawyers long before its use in our organic law. In the sense that taxes can be levied only for a public purpose, that word includes every character and kind of tax, general or special. The power of the state to demand such a bonus is referable, and referable only, to the taxing power, so that whether this "collateral succession tax," as it is denominated by the legislature, be termed a tax or a bonus, an excise, a price imposed for the privilege of taking an estate by will or inheritance, it must be levied or exacted for a public purpose only under our constitution, and under those limitations on the taxing power which exist in the very nature of our ^{§16} free institutions: *Miller on the Constitution of the United States*, 242. Outside of express constitutional inhibitions there are limitations upon the powers of every branch of our governments, state and federal. Every branch has its limitations short of absolute power. The supreme court of the United States expressed it in these words: "No court would hesitate to declare void a statute

which enacted that A and B, who were husband and wife to each other, should be so no longer, but that A should thereafter be the husband of C, and B the wife of D. Or which should enact that the homestead now owned by A should no longer be his, but should henceforth be the property of B": *Loan Assn. v. Topeka*, 20 Wall. 655. And in the same case, the court further said: "To lay with one hand the power of the government on the property of the citizen and with the other to bestow it upon favored individuals to aid private enterprises and build up private fortunes, is none the less a robbery because it is done under the forms of law and is called taxation. This is not legislation. It is a decree under legislative forms."

That the state of Missouri for public purposes may assess and levy taxes upon the succession or devolution of property under our inheritance laws or statute of wills, subject only to the prohibitions of the constitution of the state and the constitution of the United States, we have no doubt whatever. The constitutionality of such a tax has been too long affirmed by the courts of last resort to admit of doubt, but we have not found nor have counsel pointed to any statute which has received the sanction of the courts, which levied such a tax for other than a plainly public purpose. Is the purpose for which the act in question authorizes this collateral succession tax a public one? Perhaps few branches of the law have been more carefully considered than that which this inquiry suggests. ³¹⁷ The duty and power of imposing taxes is a legislative one, and the presumption is and must be that the legislature will levy a tax only for a public purpose, and the courts are justified in interposing only when it clearly appears that the constitution, which is the supreme law governing both the legislature and the courts, has been or will be violated by the enforcement of the legislative purpose. What is and what is not a public purpose is not always easily determined. The supreme court of the United States in *Loan Assn. v. Topeka*, 20 Wall. 655, states the rule to be that: "In deciding whether, in a given case, the object for which the taxes are assessed falls upon the one side or the other of this line, the courts must be governed mainly by the course and usage of the government, the objects for which taxes have been customarily and by long course of legislation levied, what objects or purposes have been considered necessary to the support and for the proper use of the government, whether state or municipal. Whatever lawfully pertains to this and is sanctioned by time and acquiescence of the people may well be held

to belong to the public use and proper for the maintenance of good government, though this may not be the only criterion of rightful taxation." The supreme court of Michigan, in *People v. Salem*, 20 Mich. 452, 4 Am. Rep. 400, with signal ability and thoroughness discussed this question and came to the conclusion that "the term 'public purpose,' as employed to denote the objects for which taxes may be levied, has no relation to the urgency of the public need, or to the extent of the public benefit which is to follow. It is, on the other hand, a term of classification to distinguish the objects for which, according to settled usage, the government is to provide, from those which by the like usage are left to private inclination, interest, or liberality."

³¹⁸ How these general principles have been applied, reference to the judgments of the courts will best determine. In *Loan Assn. v. Topeka*, 20 Wall. 655, a statute of the state of Kansas, which authorized a town to issue its bonds in aid of the manufacturing enterprise of private individuals, came before the supreme court of the United States, and it was held void because the taxes necessary to pay the bonds would, if collected, be a transfer of the property of individuals to aid in the projects of gain and profits of others, and not for a public use in the proper sense of these words. In *Allen v. Jay*, 60 Me. 124, 11 Am. Rep. 185, a town, at a meeting legally called, voted to loan its credit to a firm to the amount of \$10,000 and issue its bonds for that sum, provided the firm would invest \$12,000 to \$13,000 in a steam saw-mill with a run of stone to grind meal and maintain it for ten years, and the legislature afterward passed an enabling act authorizing said loan, but the supreme judicial court held the act unconstitutional and void, because not for a public use. All the buildings on a very large portion of the city of Charleston, South Carolina, having been destroyed by fire, the city council passed an ordinance providing for the issue of bonds by the city to be loaned the owners to build and rebuild the waste places and burned districts. The legislature afterward, by an act reciting the ordinance, fully confirmed and authorized the issue of said bonds, known as "fire loan bonds," and certain persons bought them. Afterward, suit was brought against the city to collect them, but the supreme court of the state held said bonds were issued for a private purpose and void; that the taxing power could only be exercised for some public purpose. In November, 1872, a great conflagration swept over a large portion of the city of Boston. The legislature of Massachusetts passed an act authorizing ³¹⁹ the city of Boston to issue bonds and loan the pro-

ceeds on mortgages to the owners of the land to enable them to rebuild their houses. The supreme court held the act void; that it was not for a public object in a legal sense.

In *Curtis v. Whipple*, 24 Wis. 350, 1 Am. Rep. 187, the legislature empowered the town of Jefferson to raise a sum by taxation to be paid to the treasurer of "The Jefferson Liberal Institute," a private educational institution, but the supreme court held the act void, the tax being for a private purpose, and a like conclusion was reached in *Jenkins v. Andover*, 103 Mass. 94. This court in *Deal v. Mississippi Co.*, 107 Mo. 464, held section 5697 of the Revised Statutes of 1879 void because it gave a bounty to private individuals for growing forest trees upon their own lands. In each and all of these cases it was held that the fact that the public might be incidentally benefited by rebuilding a burned city and by the establishment of manufactories and schools would not sustain the tax. Every factory, every private school or academy, every industrial enterprise which furnishes opportunity for labor and the earning of wages benefits a community in one sense, but the indirect good which inures in this way furnishes no basis for taxation of other business to build up such occupations. Learned counsel for the respondents do not seriously controvert this general proposition, but meet it with the assertion that the state university is a state institution established and maintained for a public purpose. This is at once conceded by the relators because the people of Missouri in their sovereign capacity have recognized and declared in their organic law that "a general diffusion of knowledge and intelligence is essential to the preservation of the rights and liberties of the people," and imposed upon the legislature the duty of establishing and maintaining "free public schools for ³²⁰ the gratuitous instruction of all persons in this state between the ages of six and twenty years": Const. 1875, art. 11, sec. 1. Moreover, by section 5 of article 11 of the constitution, the general assembly is enjoined, whenever the public school fund will permit and the actual necessity of the same may require, "to aid and maintain the state university now established with its present departments." By section 6 of the same article of the constitution a fund is provided, "the annual income of which, together with so much of the ordinary revenue of the state as may by law be set apart for that purpose, shall be appropriated for the maintenance of the free public schools and the state university." If, then, this collateral succession tax is levied to support the state university, unquestionably it is for a public purpose.

At this point, however, the real contention in this case arises. Relators insist that the fund sought to be accumulated by this tax is not a provision for the support of the university, but is a tax to raise a fund the proceeds of which must be paid to certain favored individuals to enable them to buy food and clothing for their own use while pursuing their studies at the university. The controversy must be determined by the act itself. By reference to the summary of its various sections as hereinbefore set out, it will be observed that three-fourths of all the moneys raised by this tax was intended to create "the state university scholarship fund" of the several counties of this state, to be kept as a permanent fund to be invested so as to bear interest. This interest is to be collected annually, and one-fourth of it added to the fund and the remaining three-fourths to be appropriated for establishing and maintaining free scholarships in the university, the amounts and terms of which are to be fixed by the curators of the university. By sections 9 and 10 provision is made for ^{and} competitive written examinations on the first week of August in each year, of actual residents of each county who shall meet the requirements for entrance in the academic department of the university; provided, however, that no applicant shall be eligible to receive such free scholarship unless the examiners "shall be satisfied that the [said] applicant is dependent upon his own exertions for his education and financially unable to otherwise obtain the same." Having thus determined who may be the beneficiaries of this tax and segregated them from the great mass of citizenship, and awarded them these free scholarships, section 10 of the act provides: "They shall be entitled to enter thereon free of matriculation fees any department, school, or college of the university, and have paid to them in equal monthly installments, while attending the university, the sum provided by the scholarship so awarded for defraying the expenses of such attendance."

Deferring for the present any discussion of the proposition that one-fourth of the tax may be sustained because it is directed to be paid into the state treasury for the benefit of the "seminary fund," an admitted public use, we direct our attention to the arguments for and against the "free scholarship fund." It is perfectly evident, we think, that no distinction can be maintained between the fund and its annual increment. It cannot be true that this fund is a state or public fund under this act, while the whole beneficial use and interest arising therefrom is private. Such a distinction is illogical and unsound. The fund is created

for the sole purpose of producing the interest to be derived from it, and it is incredible to believe that the legislature would have provided the tax at all if it was not to obtain the interest to be used for the maintenance of the scholars. The fund and the interest are inseparable. ³²²² Counsel for the curators urge that this statute can only be properly construed by keeping in view "the historical setting" of the university and "its historical genesis." They assert that university education is a proper, indeed one of the primary objects, for which public taxation may be levied, and that the extent of such taxation in aid of higher education is for the legislature alone to determine; that the constitution having established free public schools and the university, the legislature can go further and furnish free support of the children while attending these schools and the university. It is true that the learned counsel for the curators are not altogether in harmony on this proposition. Some of the learned counsel for the curators boldly argue that if the legislature can furnish free scholars and free teachers, why can it not go further and furnish a free support to the children who attend these schools, if that is deemed necessary to make the system a success, whereas their colleague draws the line at the free support of the students of the university and denies the right to furnish free living to the children attending the common schools, "because the law recognizes and enforces the parental obligation of support during the period of elementary education." Some of the learned counsel for the curators admit that such a support of the students is paternalism in its most pronounced form, but say it is "not of a hurtful or dangerous kind; that is only paternalism of the state, not of the federal government." Paternalism, whether state or federal, as the derivation of the term implies, is an assumption by the government of a quasi-fatherly relation to the citizen and his family, involving excessive governmental regulation of the private affairs and business methods and interests of the people, upon the theory that the people are incapable of managing their own affairs, and is ³²³ pernicious in its tendencies. In a word, it minimizes the citizen and maximizes the government. Our federal and state governments are founded upon a principle wholly antagonistic to such a doctrine. Our fathers believed the people of these free and independent states were capable of self-government; a system in which the people are the sovereigns and the government their creature to carry out their commands. Such a government is founded on the willingness and the right of the people to take care of their own

affairs, and an indisposition on their part to look to the government for everything. The citizen is the unit. It is his province to support the government, and not the government's to support him. Under self-government, we have advanced in all the elements of a great people more rapidly than any nation that has ever existed upon the earth, and there is greater need now than ever before in our history of adhering to it. Paternalism is a plant that should receive no nourishment upon the soil of Missouri. While the exigencies of this case may require the operation of such a principle, we are sure its germs are not to be found in the constitution of this state, nor in the spirit of its people. Whatever other fault the constitution of 1875 may have, it is certain that its framers sought most sedulously to curb the power of those clothed with authority to legislate in behalf of favored classes, and to leave the people the largest possible control over their own affairs. Especially has the power of taxation been jealously hedged about and limited. The same authority is found in the constitution to levy taxes to clothe and feed the children who may desire to attend the free public schools as there is to raise money by taxation to be handed over to young men and young women to be used by them in supporting themselves while they acquire what is ^{now} termed "the higher or university education," but we find no warrant for either in the organic law of this state, or in the character of our government.

It is one thing to provide for the establishment and maintenance of a state university, and a system of free public schools, the state, through its own officers, agencies, and municipalities constructing and owning the buildings and apparatus and employing the teachers as public functionaries, responsible under her own laws for the discharge of their duties, and a wholly different thing to support private individuals who attend the university and public schools by public taxation. But it is said that nothing is more common than the endowment of free scholarships as a part of the endowment of a university. This may be true of the universities of Europe, and individual instances are to be found in this country where some great benefactor of the race has, out of his own bounty, provided such scholarships, but these examples furnish no guide to the free states of this Union, clearly not to the legislature of Missouri under its organic law. The act under consideration endows the scholar, not the university. It provides in unmistakable terms that a fund shall be raised by taxation and paid over to students attending the university for their support while so engaged. It is a pure and

simple gift of public money by the state to private individuals for their own private use in plain violation of section 46, article 4 of the constitution, which prohibits the legislature from granting "public money to any individual, association of individuals, or other corporation whatsoever." We hold that when the constitution provided for the establishment and maintenance of the university, it conferred authority to support an institution belonging to the state, and this grant is not to be extended to the unlimited support of the pupils who may ³²⁵ attend or desire to attend that school. In obedience to the mandate of the constitution, the legislature has made generous provision for the university and public schools, and the opportunities for education are commensurate with the greatness of the commonwealth and the needs of the people. Neither the constitution nor a sound public policy demands that the state should indirectly stifle all motive for individual effort and laudable ambition. Free common schools adorn every school district in the state. Splendid normal schools are distributed to its different sections, and the doors of the university are practically opened to every thrifty, energetic young man and woman in the state. The state has not been niggardly with its children; every proper stimulus is set before them. But here she stops, and says to the citizen, the right to lay further burdens for your private benefit is exhausted. Under equal and just laws, by your own self-reliance and energy, you must win the rewards of labor and the honors of the state.

It is only necessary to add that counsel for the curators do not attempt to maintain this tax on the theory that the young men and women who would obtain these scholarships are paupers in the meaning of the law. Even without this admission, it is perfectly apparent that the act by its terms does not confine this pension to the children of poor persons who may in a legal sense be denominated paupers. The class of ambitious young men and women who could avail themselves of the benefits of this act would resent such a designation and scorn this proffered aid if to obtain it they must first be classed as paupers. It is perfectly clear that the tax is not levied upon any such principle. If it were, it would collide with another fundamental principle. It would be class legislation. Says Judge Cooley in his work on Taxation, page 121: ³²⁶ "To justify taxation for the purpose of education, the rules under which the people shall be admitted to the privileges given must not be invidious and partial, but must place all parties on a plane of practical equality. The rule

is substantially the same here that applies in the apportionment of taxes; equality must be the aim of the law, and it must be assumed that the state has no special favors to bestow upon privileged classes. . . . It would not be competent to single out some one class of the community and exclude them from the benefits of the public schools on arbitrary grounds."

Our conclusion is, that this tax is levied for a purely private purpose, and for that reason it is in contravention of the constitution of Missouri.

This tax is assailed in another vital point. Relators assert it is void for want of uniformity. John C. Conley, one of the testators, died on the sixth day of December, 1895. His will was probated February 18, 1896. Susan E. Spears, the other testator, died June 10, 1896. It is essential that we determine whether the act of 1895 or that of 1897 governs. Is the tax to be levied under the act of 1895, if valid, or the act of 1897, which was enacted long after the death of both of these testators? There is nothing in the act of 1897 which gives it a retrospective operation, and if there was, it would be in direct conflict with the constitution of Missouri, which prohibits retrospective legislation. We think it must be plain that the act of 1895, adopted prior to the death of these testators, if valid, must control, and not the act of 1897, enacted after their deaths. This, we take it, is the usual construction. By the terms of each, the devolution of the property and the right of the state to tax accrues immediately upon the death of the testators: *In re Seaman's Estate*, 147 N. Y. 69; *In re Embury's Estate*, 19 N. Y. App. Div. 214; ³²⁷ *In re Estate of Roosevelt*, 143 N. Y. 120; Const., art. 2, sec. 15; *Leete v. Bank of St. Louis*, 141 Mo. 584.

Looking to the act of April 1, 1895 (Laws 1895, p. 278), for authority for this tax, we are met with the objection that this tax is also void because the said act is in violation of section 3 of article 10 of the constitution of Missouri and of the fourteenth amendment to the constitution of the United States, and section 4 of article 10 of the constitution of Missouri.

Of these in their inverse order. As already remarked, no doubt longer exists that it is competent for the legislature to levy a tax upon the succession of estates. It is quite universally held that such a tax is not a tax upon property in the ordinary sense, but is in the nature of an excise, or bonus, exacted by the state upon the privilege or right to inherit or succeed to an estate. It is not necessary at this time to enter upon an examination of the extent of this right on the part of the state, nor to approve

or disapprove the extreme views expressed by some of the courts. While conceding the right to tax, our duty now is to ascertain, if we can, what was the purpose of the legislature in enacting this law. A primary and safe rule of interpretation of a statute is to endeavor to gather the legislative intent from the words they used: *Gardner v. Collins*, 2 Pet. 93; *Brewer v. Blougher*, 14 Pet. 178. The general assembly has declared that it intended to levy a "collateral succession tax," and we all agree that by whatever name this exaction may be called it is referable to the taxing power of the state. The controlling question is, Upon what did it authorize that tax to be levied, upon the property or estate of the deceased person, or upon the right or privilege of his beneficiaries to receive his estate by inheritance or devise? If upon the latter, it is settled by the great ³²⁸ weight of authority that it does not fall within the regular ordinary taxation upon property, which our constitution requires shall be in proportion to its value. Recurring then to the language of the act of 1895, we find that the ordinary machinery, so to speak, was not prepared for enforcing the act of 1895, as for enforcing other delinquent taxes. It ordained that a tax of \$5 for each and every \$100 of the clear market value of such property, where the money or property shall be \$10,000 or less in value, and where the money or property affected exceeds \$10,000 in value, the same shall be subject to a tax of \$5 for each and every \$100 of the clear market value thereof up to and including \$10,000 in value, and a tax of \$7.50 in addition for every such \$100 in value in excess of \$10,000, and gave a first lien upon the property affected, but provided no method for valuation. The mode of procedure was amended in 1897 by providing a means of ascertaining the value of such estates which had been overlooked in the act of 1895, and a new section to be known as section 1a, which provides that it shall be the duty of the judge of the probate court in this state, whenever the inventory and appraisement of any estate is filed, which is subject to the payment of a collateral succession tax, to immediately levy upon and charge such estate with the amount of such collateral succession tax, and require the executor, administrator, or beneficiary to pay the same, et cetera.

A "succession tax," as the words indicate and the history of such taxes clearly establishes, is an excise or duty upon the right of a person or corporation to receive property by devise or inheritance from another under the regulation of the state. Wherever properly laid, this is its distinguishing feature in contradistinction from a property tax. The language of these two

acts of 1895 and 1897 is very much involved, and more ³²⁹ or less doubt must be felt in interpreting the meaning of the legislature, and this is true of other acts in other states. When it is clear that the tax is upon the succession, it is computed, not on the aggregate valuation of the whole estate of the decedent, considered as the unit for taxation, but on the value of the separate interest into which it is divided by the will or by the statute laws of the state, and it is a charge against each share or interest according to its value and against the person entitled thereto." That is to say, it is a burden on each person claiming succession, measured by the value of his interests and collectible out of his interest only. Accordingly, in New York, after whose statute the act in question seems to have been in several respects patterned, great difficulty was experienced in construing the law, but the act being sustained as levying a succession tax, it was ruled in the matter of Hoffman's Estate, 143 N. Y. 327, that when the will created contingent estates the executors could not pay the tax until the expectancies became fixed and actual; in other words, being a tax upon the person receiving the share of the estate, it did not accrue until that person was finally ascertained, and that the state could only get its taxes when the legatees or devisees obtained their property: Hoffman's Estate, 143 N. Y. 327. And in the matter of Roosevelt's Estate, 143 N. Y. 120, in answer to the contention of counsel for the state that while it might be considered a hardship to compel annuitants to pay a tax upon an interest that they might never receive, it was the fault of the statute, and the tax could only be postponed by giving bond, the court of appeals answered: "This contention admits away the entire case of the state. It is not to be assumed that the legislature intended to compel the citizen to pay a tax upon an interest he may never receive." Until the vesting of the estate "the power to tax does not exist." ³³⁰ It is obvious that the tax is upon the transfer by will or devolution by inheritance, and, in the absence of a transfer and a transferee, there is no basis for a succession tax in its true sense, as it comes to us in the history of jurisprudence and of nations. With these essential characteristics in view, can the acts of 1895 and 1897 be said to have levied a succession tax?

Section 1a requires the tax to be levied upon the appraised value of the whole estate left by the deceased. The tax is at once levied upon that estate, and the personal representatives of the deceased, not the devisees and legatees, are required to pay the tax. How such a tax differs from general taxes upon the prop-

erty of the deceased under our system we are not able to state. The mere calling of such a tax a succession tax does not make it different from an ordinary tax upon property when the effect and operation are identical with an ordinary property tax. This tax is collectible out of all property devised by will or descending to any person other than the father, mother, husband, wife, or direct lineal descendant, whether the estate of the ancestor, deviser, or grantor is solvent or insolvent. If insolvent, there is nothing to which the heir or devisee or legatee can succeed, and yet upon the theory of a succession, an onerous tax is added to the charges against an estate and payable in advance of other claims. The language of the supreme court of Wisconsin in *State v. Mann*, 76 Wis. 478, seems exceedingly appropriate upon this point: "A succession tax would necessarily be imposed upon the respective parties thus succeeding to such residue. But the tax in question is not upon such succession, but upon the whole estate at its appraised valuation, regardless of whether it is solvent or insolvent. In case of an insolvent estate, nothing would be left after the payment of debts for transmission, and in most estates there are likely to be sufficient debts to ³³¹ reduce the amount of transmission far below the amount of such valuation. Besides, the amount of such tax is graduated by the amount of such appraisal and is to be paid by the executors or administrators before or at the time of filing such appraisal, notwithstanding they may only be interested as such officials and never succeed to any of such estate. Manifestly, the burden imposed is not a succession tax, but a tax upon the whole estate, regardless of whether it is solvent or insolvent." The New York act (Laws 1896, c. 908, sec. 225) provides for a refunding of a proportionate part of the tax in case debts are allowed after its payment, and it was owing largely to this provision that that act was sustained, but no such provision is found in our acts of 1895 and 1897: *In re Westurn's Estate*, 152 N. Y. 93.

We think the language of this act, whatever conjecture we may indulge as to the intention of its author, imposes a tax directly upon the property of the decedent, and not upon those who may succeed to his estate, and it must be conceded that if it is a property tax it is unconstitutional, because it subjects this estate to an additional property tax to that levied upon all other like property in the state for the same year, and is not levied in proportion to its value.

But in no event can the act of 1895, which governs these two cases, be upheld, because the tax authorized by it is not "uni-

form upon the same class of subjects within the territorial limits of the authority levying the tax": Const., art. 10, sec. 3. The class of subjects to be taxed under this act is the succession or inheritance of property by collateral kindred or devisees other than those named in the statute as exempt from its imposition. It is not necessary to determine what would or would not be proper classification under this act in all cases, but it ³³² is perfectly clear that when the tax is levied upon the property as under this act, uniformity is only attainable by levying the same per cent upon all property belonging to persons bearing the same relation to the decedent. A law which levies five per cent upon one cousin or uncle whose legacy is \$10,000, and five per cent upon the first \$10,000 of a legacy of \$20,000 bequeathed to another cousin of the same degree, and twelve and one-half per cent upon the remaining \$10,000 thereof, violates the constitutional principle of uniformity. It is an arbitrary classification without rhyme or reason. Such was the decision of the supreme court of Ohio in *State ex rel. Schwartz v. Ferris*, 53 Ohio St. 314, upon a provision of the constitution of that state substantially like section 3, article 10 of the constitution of Missouri.

It is significant that in New York, Maine, Maryland, Virginia, Pennsylvania, and Massachusetts, in which inheritance taxes are sustained, the statutes only authorize a uniform rate of taxation. The constitutional guaranty of uniformity upon the same class of subjects would avail but little if the legislature can arbitrarily vary the classes as often as the amount of property devised or transmitted by inheritance shall differ. If such a rule obtain, the classes will be innumerable, and the constitution a dead letter. Where the amount of property received is made the basis of the tax, uniformity can only be attained by levying the same per cent upon the property of each beneficiary under the will or by inheritance. While the legislature might, perhaps, distribute the collaterals according to the different degrees of kinship to the decedent or testator or grantor, and levy a different rate upon the different degrees, yet when it ignores all such natural classification and makes the amount of ³³³ money received by each the test of classification, it runs counter to another principle that is wellnigh universally accepted that a uniform rate of taxation upon every man's property secures equality of burden. To levy a different rate simply because the amount of each man's holdings is different would produce favoritism and destroy that principle of equality before the law which is the boast of free

government. If it be urged that the one receiving the larger bounty enjoys a greater privilege, still the principle of uniformity answers that the value of his right to receive is in direct proportion to the value of the property to which he succeeds, and must, if taxation is to be uniform, be taxed in that proportion or according to one common rate. In *State v. Hamlin*, 86 Me. 495, 41 Am. St. Rep. 569, the supreme court of Maine in upholding a tax consisting of a uniform per cent, said: "The constitutional requirement of uniformity is satisfied by a tax on the transmission of property by will or descent to strangers and collaterals when it is uniform as to the entire class affected, although other classes of persons are exempted from the tax": See, also, *Railroad Tax Cases*, 13 Fed. Rep. 722.

Other grave objections are made to the act, one challenging its title as containing two distinct subjects; another that the various subject matters found in the body of the act are not indicated at all in the title. These objections have been presented with the greatest ability and have been duly considered, but, inasmuch as the propositions already decided go to the very substance of the act, we deem it unnecessary to pass upon the point as to the title of the act. To respond to the very thorough discussion of the point by counsel would extend this opinion unnecessarily to too great length.

The act of 1895 must be held void, and it follows that the probate courts of Boone county and of the ³³⁴ city of St. Louis were wholly without jurisdiction to levy the taxes upon the estates of John C. Conley and Susan E. Spear, and their proceedings in that behalf must be quashed, and it is so ordered.

Sherwood, Burgess, Robinson, and Brace, JJ., concur.

Williams and Marshall, JJ., having been of counsel, take no part in the decision of the case.

TAXES—MUST BE FOR PUBLIC PURPOSES.—No principle of law is more firmly established than that the legislature can neither impose, nor authorize subordinate agencies of government to impose taxes or assessments for other than public purposes: See monographic note to *Zigler v. Menges*, 16 Am. St. Rep. 365, as to what purposes justify the imposition of taxes or assessments; monographic note to *New Orleans v. Telephone etc. Co.*, 8 Am. St. Rep. 510.

TAXES—COLLATERAL INHERITANCE—VALIDITY OF.—The legislature may impose a tax on the transmission of estates by devise or descent, notwithstanding a provision in its constitution requiring that taxes shall be equal and uniform: See monographic note to *New Orleans v. Telephone etc. Co.*, 8 Am. St. Rep. 508. Such a tax is not a direct tax upon the property itself, but merely an impost

or excise imposed by the state for the privilege accorded in permitting property situated therein to be transmitted by will or descent or distribution: See monographic note to *State v. Hamlin*, 41 Am. St. Rep. 581, on the taxation of collateral inheritances.

STATUTES—CONSTRUCTION.—Words of a statute ought not to be given a retrospective operation, unless they are so clear, strong, and impressive that no other meaning can be annexed to them, or unless the intention of the legislature cannot be otherwise satisfied: *Lawrence v. Louisville*, 96 Ky. 595; 49 Am. St. Rep. 809, and note.

WILLIS v. BARRON.

[143 MISSOURI, 450.]

PARTNERSHIP—ONE PARTNER MAY SUE ANOTHER AT LAW ON A PROMISSORY NOTE executed by the partnership to him, where there is a statute providing that all contracts which by the common law are joint shall be construed as joint and several, and that in all cases of joint obligations of copartners and others, suits may be prosecuted against any one or more of them who are liable.

PARTNERSHIP—COUNTERCLAIM.—Where a person is sued as copartner on a promissory note executed by the firm, an unsettled partnership claim cannot be pleaded as a counterclaim, and is not any defense to the action.

PRACTICE—EQUITABLE DEFENSES.—The mere suggestion of an accounting or of an equitable defense is not sufficient to oust a court of law of jurisdiction. The defendant must go farther, and state some specific ground for invoking the jurisdiction of equity.

J. H. Cupp, for the appellant.

H. S. Boothe and W. W. Fry, for the respondent.

⁴⁵³ GANTT, P. J. This is an action by the executrix of R. T. Willis, deceased, to recover one-half of the amount of two notes and interest executed by the firm of Willis & Barron, composed of R. T. Willis and P. J. Barron to R. T. Willis in his lifetime. The petition alleges the partnership of Willis & Barron in 1890, the execution of the notes, the death of Willis in 1891, the ⁴⁵⁴ qualification of plaintiff as executrix of the estate of R. T. Willis, an administration of the partnership estate of the firm, its insolvency and the final settlement thereof, and the discharge of plaintiff as administratrix thereof, and concluded with a prayer for judgment for one-half of the amount of said notes and interest.

Defendant admitted the partnership, the execution of the notes, the appointment of plaintiff as executrix, but averred there had never been an accounting between defendant and R. T. Willis, and charged that Willis had drawn out partnership assets

in excess of his share to an amount greater than the notes, and prayed for the appointment of a referee and for an accounting. The reply was a general denial of the answer.

There was a judgment for plaintiff in the circuit court, from which defendant appealed to the Kansas city court of appeals. That court, upon a division of opinion, certified the cause to this court. Appellant insists upon two propositions to reverse the judgment: 1. That an action at law cannot be maintained by one partner upon a promissory note executed to him individually by the partnership of which he is a member; 2. That the court erroneously excluded evidence tending to show that R. T. Willis in his lifetime drew out of the partnership funds, in excess of his share, more than enough to pay off his share of the notes sued on.

1. At common law, partnership contracts were construed to be joint only, not joint and several. As a consequence of this rule, in actions by or against partners, it was necessary that all the partners should join as plaintiffs or be joined as defendants. A further consequence of this doctrine was, that a partner could not sue a firm of which he was a member on a note executed by the firm to himself, and if a person were a ⁴⁵⁵ member of two firms, one of said firms could not sue the other at law, as the names of all the members of the firm, whether appearing in the firm name or not, must be set out in the declaration or petition, and likewise the names of all the partners of the firm sued must all be set out, and the result would be a party suing himself, which the law would not tolerate: 1 Chitty on Pleading, *47, *48; 1 Daniel on Negotiable Instruments, sec. 354. The remedy in such cases was in equity. This difficulty of suing at law ceased, however, when a negotiable instrument passed to a third party because in such case the indorsee could sue all the makers. Although one partner could not sue his firm, or a firm having a common partner with another firm could not sue the other at law, no difficulty was found by the courts of chancery in enforcing notes given by a firm to one of its members, or by one firm to another firm, having a common partner, for equity treated the different firms for the purposes of substantial justice precisely as if composed of strangers or as if they were corporate companies: 1 Story's Equity Jurisprudence, secs. 679-681. All the law writers and all the adjudged cases place the disability of one partner to sue his firm upon its note to him upon the grounds that a man cannot contract with himself, and because it was deemed absurd to permit a party to be both a plaintiff and defendant in the same action, and for the further reason that until the part-

nership affairs were adjudged and the balance struck it could not be said one partner was indebted to another. Judge Bliss, in his Code Pleadings, section 91, says: "At common law, where there was a joint obligation or undertaking, in an action upon it, all who thus join must be made defendants. . . . Thus contracts made by partners with third persons are joint and all must be joined in an action."

Recognizing that this rule existed at common law, ⁴⁵⁶ and the grounds upon which it was based, we are confronted with our statute, section 2384 of the Revised Statutes of 1889, which provides that "all contracts which by the common law are joint only shall be construed to be joint and several," and section 2387, which further provides that "in all cases of joint obligations and joint assumptions of copartners or others, suits may be brought and prosecuted against any one or more of those who are so liable." Now the partner holding the firm's note payable absolutely to himself at common law was under no disability to sue his firm, save only that the note, being a joint promise, he was necessarily compelled to sue himself; but since the statute now makes the note the several contract of each member of the firm, and makes each partner liable in solido, the payee is no longer under the necessity of suing himself, and hence, so far as the question of parties to pleadings is concerned, he can sue either or all of the other partners without infringing the common-law rule of pleading. Likewise, as the note is the several contract of each partner, no legal objection can be raised to the validity of the contract itself, as they are clearly adversary parties capable of contracting each with the other and binding each other. While the payee of such a note could not be both debtor to and creditor of himself, at common law, it is not true that the payee cannot be creditor, and the other members of the partnership, who borrow his money and give him a partnership note therefor, cannot be his debtors, each being severally liable thereon for the whole amount of the note. To defeat such a note after a partner has loaned his firm out of his individual assets the amount of money it represents, merely because he is a member of the firm, is to defeat the plain purpose of the parties and the justice of the case, whereas to hold all the partners bound except the payee himself is to effectuate ⁴⁵⁷ the truth of the transaction and charge the real debtors with their obligation. So far as the loan of the money to the firm by one partner is concerned, it is as to him at least an individual, and not a firm, transaction, to be settled upon an accounting in equity, or in the probate court under our statute, if one partner dies.

This conclusion does not militate against the well-settled doctrine that an action of assumpsit at law cannot be maintained by one partner against another for a balance owing on the firm account in the absence of an adjustment of the partnership affairs: *Scott v. Caruth*, 50 Mo. 120; *Bond v. Bemis*, 55 Mo. 524; *Smith v. Smith*, 33 Mo. 557.

To say that one partner could not sue another at law is stating the rule too broadly even at common law. Chief Justice Marshall, in *Van Ness v. Forrest*, 8 Cranch. 30, called attention to this error. In that case it was ruled that a promissory note given by one member of a commercial company to another member for the use of the company would support an action at law by the promisee in his own name against the maker, notwithstanding both parties were partners in that company, and the money when recovered would belong to the company, the chief justice saying: "The principle that a company cannot sue its members does not apply to the case, nor does the principle that a partner cannot sue a partner on a partnership transaction apply to any case where a note is given for money not to a firm, but to an individual member." So in *Mitchell v. Wells*, 54 Mich. 127, one partner sued another on a note, and the defense was, that it was connected with partnership transactions and dependent on them, and paid by credits. It was insisted there, as here, that the remedy was in equity alone, but the court said: "It is a legal obligation in ⁴⁵⁸ form, and therefore may be sued at law according to its terms. . . . There is no case that we are aware of where an obligation legal in form cannot be sued at law."

So in *Morrison v. Stockwell*, 9 Dana, 172, the action was upon a promissory note payable to James N. Morrison, executed by "Morrison & Stockwell," of which firm Morrison, the plaintiff, was a partner. The court of appeals of Kentucky, through Chief Justice Robertson, said: "The fact that Morrison [the plaintiff] was both obligee and apparent obligor should, per se, have no other legal effect than that of making the note the single obligation of Stockwell. . . . Morrison's incapacity to make a contract with himself did not affect the capacity of Stockwell to make a binding contract with him on one side and in their joint names on the other side. The only reason why Morrison was not bound as an obligor did not apply to Stockwell. There was then a legal obligation and it was, of course, the single obligation of Stockwell." In *Bonnaffe v. Fenner*, 6 Smedes & M. 212, 45 Am. Dec. 278, the supreme court of Mississippi said: "It is laid down as a general rule that where one partner has a claim upon

his copartner for a sum of money due on account of the partnership, but not constituting the balance of a separate account, or a general balance of all accounts, he cannot recover by action at law." But this rule has its exceptions. A prominent exception takes the place of the rule when the sum sought to be recovered is separated from the partnership account: Collyer on Partnership, 148, 158. The making of a promissory note by several partners in favor of another is an acknowledgment of a separation of the sum from the partnership account: Smith v. Lusher, 5 Cow. 688; and the same court followed this precedent in Sturges v. Swift, 32 Miss. 239, and Anderson v. Robertson, 32 ⁴⁵⁹ Miss. 241; Merrill v. Green, 55 N. Y. 270; Walker v. Wait, 50 Vt. 668; Scott v. Campbell, 30 Ala. 728; 2 Lindley on Partnership, 565.

But the question is settled in this state by the decision of this court in Faulkner v. Faulkner, 73 Mo. 327, to which we have not been referred, in which it was unanimously held that the note being the joint and several contract of each maker, the plaintiff could recover at law and would not be driven into equity, the court, while admitting the common-law rule, saying: "This principle, however, does not apply even at common law, except where the contract is joint, and not where it is (as are all contracts in this state) both joint and several": Smith v. Gregory, 75 Mo. 121.

2. Having disposed of plaintiff's right to sue, it remains only to be seen whether the answer set up an equitable defense requiring the case to be heard by the chancellor. It will be observed that defendant admits the partnership and the execution of the note. He pleads payment and a counterclaim of an unadjusted partnership account. He does not state any account nor show cause why he cannot. The defense of payment is, of course, a legal defense, and was heard. Whatever may be the law in other jurisdictions, it is the settled law of this court that an unsettled partnership account cannot be pleaded as a counterclaim: Wright v. Jacobs, 61 Mo. 19; Leabo v. Renshaw, 61 Mo. 292; Jones v. Shaw, 67 Mo. 667; Berthold v. O'Hara, 121 Mo. 88.

There is, moreover, no sufficient pleading of any equitable defense. Upon principle and the weight of authority, we think it is clear that a mere suggestion of an accounting, and an equitable defense, will not oust a court of law of its jurisdiction, but a party must go further and state some specific ground for invoking the jurisdiction of equity. This the defendant has not done. A careful reading of the evidence offered by ⁴⁶⁰ defendant con-

vinces us that the judgment was for the right party and there is no merit in the defense, either in the answer or the facts attempted to be shown.

The judgment of the circuit court is affirmed.

Sherwood, J., concurs.

Burgess, J., absent.

PARTNERSHIP—SUIT BETWEEN PARTNERS—ON PROMISSORY NOTE—SETOFF.—A partner has a right to relief against the partnership when he contracts as a creditor or otherwise therewith, and the transaction is such as to be separated from the general partnership accounting: *Carpenter v. Greenop*, 74 Mich. 664; 16 Am. St. Rep. 662, and note. The making of a promissory note by several partners in favor of another partner is an acknowledgment of the separation of the sum from the partnership account, and such partner may recover at law against his copartners upon it: *Bonnaffe v. Fenner*, 6 Smedes & M. 212; 45 Am. Dec. 278, and note; extended note to *Course v. Prince*, 12 Am. Dec. 649-651, on actions between partners. See *Beede v. Fraser*, 66 Vt. 114; 44 Am. St. Rep. 824. As to what demands may be the subject of setoff, see monographic note to *Gregg v. James*, 12 Am. Dec. 152-157.

MADDOX v. DUNCAN.

[143 MISSOURI, 612.]

NEGOTIABLE INSTRUMENTS.—Every indorsement of a promissory note, whether for accommodation or otherwise, is essentially a new contract, independent of the contract obligations of the maker.

NEGOTIABLE INSTRUMENTS—SURETY OR INDORSER. A payee of a note who indorsed thereon a waiver of notice, protest, and demand and an assignment of the note as a guaranty of payment is not a surety, but an indorser.

LIMITATIONS.—Part payment of a promissory note before the statute of limitations attaches takes it out of the statute as to the person making such payment and as to joint obligors with him.

STATUTE OF LIMITATIONS—MAKER AND INDORSER.—Part payment of a promissory note by a maker cannot prevent the statute of limitations from running in favor of the indorser, though by the statutes of the state the maker and indorser may be sued jointly.

George Robertson, for the appellant.

R. D. Rodgers and W. W. Fry, for the respondent.

¶17 **BURGESS, J.** On June 1, 1877, James T. Carter executed his note to the defendant for the sum of two thousand dollars due three years after date with interest at the rate of ten per cent per annum compounded annually. Thereafter defend-

ant, by the following indorsement, assigned said note to Samuel Grant: "Waiving notice and protest and demand, I assign the within note to Samuel Grant for value received and I guarantee the payment of it. August 8, 1877. M. G. Duncan." Grant assigned the note to plaintiff about June 1, 1891.

The petition was in two counts. The first count was an action against the defendant as indorser, and the second count was against him as indorser and surety. The answer was a plea of the ten-year statute of limitations. Numerous payments were made upon the note by the maker, Carter. The last payment made by him was one hundred and fifty dollars, paid January 27, 1891. The note, however, was secured by deed of trust on a tract ⁶¹⁸ of land in Audrain county, which was sold thereunder by J. N. Stephens, sheriff and acting trustee, and nineteen hundred and fifteen dollars and ninety-three cents realized from the sale, which was applied as a credit on said note on March 16, 1894. No payment was ever made upon the note by defendant. At the September term, 1895, of the circuit court of Audrain county, the case was tried to the court without the aid of a jury, and judgment rendered in favor of plaintiff for two thousand six hundred and eighty dollars and twenty-four cents, from which defendant appealed.

It is a rule of universal application in commercial law that every indorsement of a promissory note, whether for accommodation or otherwise, is essentially a new contract, independent of any contract obligations of the maker: Edwards on Bills and Notes, 3d ed., sec. 383; Beach on Modern Law of Contracts, sec. 605; Tiedeman on Commercial Paper, sec. 256; Dunnigan v. Stevens, 122 Ill. 396; 3 Am. St. Rep. 496; Trabue v. Short, 18 La. Ann. 257; Trimble v. Thorne, 16 Johns. 152; 8 Am. Dec. 302; Aymar v. Sheldon, 12 Wend. 439; 27 Am. Dec. 137; Hunt v. Standart, 15 Ind. 35; 77 Am. Dec. 79.

In Furgerson v. Staples, 82 Me. 159, 17 Am. St. Rep. 470, it is said: "The indorsement of a note is a new contract. The indorser engages that the note shall be paid according to its tenor; that is, upon proper presentment, demand, and notice; he engages that it is genuine and the legal obligation that it purports to be, and that he has title to it, and a right to indorse it: Story on Promissory Notes, sec. 135; Daniel on Negotiable Instruments, sec. 669; State Bank v. Fearing, 16 Pick. 533; 28 Am. Dec. 265; Prescott Bank v. Caverly, 7 Gray, 217; 66 Am. Dec. 473. All engagements of the indorser, except payment, conditioned upon demand and notice, and possibly the validity

of the note when it is voidable only, are absolute warranties and not dependent upon any condition whatever. If the note transferred by indorsement be a forgery, or absolutely void for any other reason, the indorser may be sued for the original consideration paid him, or may be held as a party without ⁶¹⁹ demand and notice: Daniel on Negotiable Instruments, secs. 669, 675, 1113; Parsons on Notes and Bills, 444; Copp v. McDugall, 9 Mass. 1; Burrill v. Smith, 7 Pick. 291." The indorser's liability as such becomes fixed when demand of payment of the note is made of the principal on the day that it falls due, is refused and he is notified thereof. These conditions are expressly waived by the indorser in this case, so that the liability of Duncan became fixed when the note became due and default was made in the payment.

The question to be determined is with respect to the relation that defendant bore to the holder of the note, whether that of indorser or surety. It is perfectly clear that he was not a surety, so that, whether he be indorser or guarantor, he could not, in the absence of statutory enactment, be joined in the same action with the maker: Ross v. Jones, 22 Wall. 576; Graham v. Ringo, 67 Mo. 324. But by section 1995 of the Revised Statutes of 1889, it is provided that "every person who shall have a cause of action against several persons, including parties to bills of exchange and promissory notes, and who shall be entitled by law to one satisfaction therefor, may bring suit thereon jointly against all or as many of the persons liable as he may think proper," so that plaintiff, had he desired to do so, might have maintained an action against Duncan and the maker of the note jointly.

In Vanzant v. Arnold, 31 Ga. 210, the defendant negotiated notes with the following indorsement on the back: "For value received, we assign the within notes to A. J. & H. and H. E. D. & Co., waiving demand and notice, and guarantee the payment of the same." And it was held that the defendants were liable on said notes as indorsers. In Weitz v. Wolfe, 28 Neb. 500, the payee of a negotiable promissory note sold the same ⁶²⁰ with the following written on the back: "I guarantee the payment of the within note, waiving demand and notice of protest," which was signed by the payee and it was ruled that he was indorser. By guaranteeing the payment of the note the position of the indorser and payee was not changed from that of indorser to that of guarantor. It will be observed that the indorsement on the note here sued on is in almost the exact words of the indorsements on the notes sued on in those cases, which seem to settle

the question that the defendant herein occupies the relation of indorser toward the notes in question.

What effect, then, did the payments on the note by the maker which stayed the statute of limitations and kept the note alive as to him, have upon the defendant as indorser? This depends upon the proper construction to be given to our statute of limitations. The sections bearing upon the subject now under consideration are as follows:

“Sec. 6793. In actions founded on any contract, no acknowledgment or promise hereafter made shall be evidence of a new or continuing contract, whereby to take any case out of the operation of the provisions of this article, or deprive any party of the benefit thereof, unless such acknowledgment or promise be made or contained by or in some writing subscribed by the party chargeable thereby.”

“Sec. 6794. If there be two or more joint contractors or joint executors or administrators of any contract, no such joint contractor or executor or administrator shall lose the benefit of the provisions of this article, so as to be chargeable by reason only of any acknowledgment or promise made or subscribed by any other or others of them.”

“Sec. 6795. Nothing contained in the two preceding sections shall alter, take away, or lessen the ⁶²¹ effect of a payment of any principal or interest made by any person.”

In *Craig v. Callaway County Court*, 12 Mo. 94, it was ruled that the payment of interest by one of several joint obligors in a bond before the statute of limitations attaches takes it out of the statutes of limitations as to the others. So it was held in *Vernon Co. v. Stewart*, 64 Mo. 408, 27 Am. Rep. 250, that part payment made upon a bond by the administrator of one of the joint makers within the statutory period would prevent the running of the statute of limitation in favor of the other makers of the bond. And in *Bennett v. McCanse*, 65 Mo. 194, it was intimated that part payment of a note by a comaker will arrest the running of the statute as against all the parties to the note. The same rule was announced in *Bender v. Markle*, 37 Mo. App. 234. When this case was before the St. Louis court of appeals (*Maddox v. Duncan*, 62 Mo. App. 474), Rombauer, J., in delivering the opinion of the court, said: “In *Leach v. Asher*, 20 Mo. App. 656, and *Zervis v. Unnerstall*, 29 Mo. App. 474, we reviewed the decisions in this state on that subject and were forced to conclude that the rule as stated in *Craig v. Callaway County Court*,

12 Mo. 94, was the rule prevailing in this state, whatever the rule may be in other jurisdictions."

Duncan was neither joint maker of nor co-obligor on the note in question. His position was that of indorser, and his contract as such was separate from and independent of the note, and so entirely independent from that of maker, or co-obligor, that he could not at common law have been sued jointly with the maker, but a separate action was indispensable: 1 Daniel on Negotiable Instruments, 4th ed., sec. 689; *Ross v. Jones*, 22 Wall. 576. An indorser's contract is governed by the laws of the state where the indorsement is made, and not necessarily ⁶²³ by the laws of the state where the note is made. They may be and often are made in different states.

The position of indorser is so at variance with that of surety and co-obligor that the adjudications to the effect that payment made on a note by one joint maker or co-obligor within the statutory period takes it out of the statute of limitations as to the other makers or co-obligors, have no bearing upon this case. Nor does the fact that under the statute the maker and indorser may be sued jointly change the relation of the parties.

The statute which provides (section 6795, *supra*) that "nothing contained in the two preceding sections shall alter, take away, or lessen the effect of a payment of any principal or interest made by any person," means that such payment, in order to arrest the statute of limitations, must be made by some cosurety or co-obligor, or the legal representative of such person, and does not mean that such a payment by a maker or surety on the note or a stranger thereto will arrest the statute as to an indorser.

Our conclusion that the payments on the note by the maker, Carter, did not arrest the running of the statute of limitations as to the indorser, Duncan, and that more than ten years having elapsed after plaintiff's cause of action accrued against him as indorser that the action was barred at the time of the commencement of the suit.

We therefore reverse the judgment without remanding the cause.

Gantt, P. J., and Sherwood, J., concur.

NEGOTIABLE INSTRUMENTS—CONTRACT OF INDORSEMENT.—Making a note and indorsing or assigning it are distinct contracts: *Nichols v. Porter*, 2 W. Va. 13; 94 Am. Dec. 501. Mere indorsement without transfer is no contract: *Young v. Harris*, 14 B. Mon. 556; 61 Am. Dec. 170; *Stanford v. Pruet*, 27 Ga. 243; 73 Am. Dec. 734. See *Felch v. Bugbee*, 48 Me. 9; 77 Am. Dec. 203.

NEGOTIABLE INSTRUMENTS — INDORSEMENT — EFFECT OF GUARANTY.—One who is the payee or holder of negotiable paper, and writes above his indorsement a contract of guaranty of payment, is an indorser with enlarged liability. The mere writing of a special contract above his name does not affect the character of his act as an indorsement. It is nevertheless an indorsement: *Dunham v. Peterson*, 5 N. Dak. 414; 57 Am. St. Rep. 556, and note.

Of the Relation of Agency Existing Between Persons Jointly Liable.*

The question to be discussed in this note is hinted at, but not directly considered, in the principal case. Had the court considered that a joint liability existed between Carter, the maker, and Duncan, the indorser, of the note, the question which we are to consider would have presented itself, but, having decided that no such liability existed, the question was dismissed as irrelevant to the issue. The relation existing between persons whose interests or liabilities are joint, must in some particulars be one of agency. They have a community of interest, and each must be allowed at times to represent his co-obligor in matters appertaining to this interest. One joint debtor may pay the debt and gain the right to enforce contribution from his codebtors. He may satisfy the debt and his discharge therefrom will operate also in favor of his fellow-obligors: *Chetwood v. California Nat. Bank*, 118 Cal. 414; *Fitch v. Hammer*, 17 Colo. 591; *Scofield v. Clark*, 48 Neb. 711; *Maslin v. Hiett*, 37 W. Va. 15. Courts have disagreed as to the extent to which such persons may represent each other, and their disagreement, dating from the great case of *Whitcomb v. Whiting*, 2 Doug. 652, has filled the books with discussions of the question. In deciding that case, Lord Mansfield erred, and his erroneous judgment was extensively followed by American courts through their adherence to the doctrine of *stare decisis*. Its holding, so far as relates to our inquiry, is as follows: "Payment by one is payment for all, the one acting virtually as agent for the rest; and in the same manner an admission by one is an admission by all, and the law raises a promise to pay when the debt is admitted to be due." The question involved was as to whether one joint debtor could bind another by acknowledgment, part payment, or new promise to take the common debt out of the statute of limitations as to both, which question runs through most of the cases cited in this note. Lord Mansfield's decision was repudiated by the supreme court of the United States in *Bell v. Morrison*, 1 Pet. 351, and, though at first followed by many of our state courts, has at length been expressly repudiated in most of them, as we shall see, and its application limited in some states which still adhere to its defective reasoning. Where courts have lacked the courage to reverse their own decisions, statutory enactment has aided them, until one learned author declares that *Whitcomb v. Whiting*, 2 Doug. 652, is recognized as stating the law only in four states, Connecticut, New Jersey, Rhode Island, and Delaware: Woods on

* REFERENCE TO MONOGRAPHIC NOTES.

New promise by joint debtor: 10 Am. Dec. 695-697.

Of the effect of the statute of limitations when some but not all of the parties to an obligation are protected by it: 60 Am. St. Rep. 201-210.

Limitations, sec. 285. See *Kallenbach v. Dickinson*, 100 Ill. 427; 39 Am. Rep. 47. The discussion of the merits of its holding we may regard as closed, and the current of judicial authority turned aside and divided by this great case to be restored to their proper channels. In this note a review of the American cases on the question will be attempted.

In General—Joint Obligors as Agents for Each Other.—To make a payment, acknowledgment, or new promise binding upon a party it must be made either by himself or by an authorized agent; otherwise made, a claim will not be saved from the statute of limitations: *McMullen v. Rafferty*, 89 N. Y. 456; *Ringo v. Brooks*, 26 Ark. 540; *Ryal v. Morris*, 68 Ga. 834. A payment by an unauthorized person does not affect the rights of a debtor under the statute: *Smith v. Coon*, 22 La. Ann. 445; *Minniece v. Jeter*, 65 Ala. 222. It is said that joint obligors, in matters pertaining to the payment and discharge of the joint liability, speak and act for each other: *Green v. Rick*, 121 Pa. St. 130; 6 Am. St. Rep. 760. Joint obligees are agents for each other to receive payments on the obligation: *Moore v. Berrer*, 60 Minn. 240. Thus either of two payees of a note may take necessary steps to secure its payment: *Voss v. Murray*, 50 Ohio St. 19. There can be no foundation in reason, however, for extending this agency any further than may be necessary to consummate the contract. In the words of the court in *Kallenbach v. Dickinson*, 100 Ill. 428, 39 Am. Rep. 47, "we are aware of no principle of law which sanctions the idea that a codebtor, merely because he is such, has authority to bind his associates to a new contract, although it may be in regard to the old debt"; *Bell v. Morrison*, 1 Pet. 351; *Willoughby v. Irish*, 35 Minn. 63; 59 Am. Rep. 297; *Wallis v. Randall*, 81 N. Y. 164. "Their interests are joined only so far as the contract joins them. Their contract or understanding by which they agree together to enter into the joint liability to the creditor is one thing, and the joint contract with the creditor is another. Their relations to each other are defined by the former, and their joint relations to the creditor by the latter; and their joint relations in one aspect in no sense define those in the other": *Coleman v. Fobes*, 22 Pa. St. 156; 60 Am. Dec. 75. Cosureties are not agents for each other to agree to an extension of time: *Wolf v. Finks*, 1 Pa. St. 435; 44 Am. Dec. 141; or to make an alteration in their bond: *Smith v. United States*, 2 Wall. 219. A principal is not the agent of his surety: *Hayes v. Burkam*, 94 Ind. 311; nor are joint owners of property agents for each other: *Miller v. Vermurie*, 7 Wash. 386. And so we might go on if we did not wish to avoid the duplication of matter contained in the detailed treatment of the different joint relations given below.

Express Agency Between Joint Debtors.—Where money is paid or an acknowledgment or new promise is made by one of two or more joint debtors, at the request of the other or others, the running of the statute will be stopped as to all: *Pitts v. Hunt*, 6 Lans. 146; *Haight v. Avery*, 16 Hun, 252; *Winchell v. Hicks*, 18 N. Y. 558; *Munro v. Potter*, 34 Barb. 358. In such a case, the agency is express. It has been held that a subsequent parol promise by one joint debtor to reimburse him for payments made without the former's knowl-

edge or assent is not sufficient to deprive him of his defense under the statute: *Pfenninger v. Kokesch*, 68 Minn. 81. In the absence of assent or acquiescence or express authority from one co-obligor, it is contrary to the elementary principles of law applicable to statutes of limitation to hold him bound by the admissions or representations of his fellow obligor. Such authority must be expressly given, or result from the relations of the parties: *McCarthy v. White*, 21 Cal. 495; 82 Am. Dec. 754; *Kallenbach v. Dickinson*, 100 Ill. 427; 39 Am. Rep. 47; *Waughop v. Bartlett*, 165 Ill. 124; *Boynton v. Spafford*, 162 Ill. 113; 53 Am. St. Rep. 274; *Pfenninger v. Kokesch*, 68 Minn. 81; *Oleson v. Wilson*, 20 Mont. 544; 63 Am. St. Rep. 639; *McMullin v. Rafferty*, 24 Hun, 363; *Kelly v. Weber*, 27 Hun, 8; *Bender v. Blessing*, 82 Hun, 320; *Murdock v. Waterman*, 145 N. Y. 55; *Harper v. Edwards*, 115 N. C. 246; *Wesner v. Stein*, 97 Pa. St. 322; *Bailey v. Corliss*, 51 Vt. 366; *Cowhick v. Shingle*, 5 Wyo. 87; 63 Am. St. Rep. 17. Says the court in *Bergman v. Bly*, 66 Fed. Rep. 40, concerning this point: "Courts in this country and England have discussed it pro and con so long and so often that there remains nothing new to be said on the subject. It would be an affectation of learning, and serve no useful purpose, to repeat the reasoning on the question, or review the conflicting decisions."

Part Payment or Acknowledgment of Barred Claim.—As we have already said, *Whitcomb v. Whiting*, 2 Doug. 652, is the cause of most of the disagreement upon this subject. Looking at Lord Mansfield's decision therein, it appears that it would have been immaterial whether the claim in question was or was not barred under the statute of limitations when the part payment was made upon it. Indeed, "if the principle of Lord Mansfield be correct, the acknowledgment of one joint debtor will bind all the rest, even though they should have utterly denied the debt, at the time when such acknowledgment was made": Justice Story in *Bell v. Morrison*, 1 Pet. 360, 368; *Kallenbach v. Dickinson*, 100 Ill. 427; 39 Am. Rep. 47. American courts, however, in following *Whitcomb v. Whiting*, 2 Doug. 652, have been slow to give such scope to the agency implied between joint debtors. Accordingly, there is little dissent from the proposition that one joint debtor cannot, after the bar of the statute has attached to the joint debt, by part payment or acknowledgment, remove the bar as to the others, and give to the statute a new point from which to run. In *Biscoe v. Jenkins*, 10 Ark. 108, this proposition was adhered to, though a different rule had been declared in a previous case, where part payment was made before the bar attached. The court, per Scott, justice, examined the conflicting cases critically, and concluded: "In a word, when the bar of the statute has attached, the essence of the thing done when the debt is revived is the creation of a new right of action on the old debt, and the destruction of a legal defense to any action that before might have been brought on the debt, and this right of defense cannot be taken away without the consent, express or implied, of the party entitled to it. And, in our opinion, a part payment made by a copromissor after the bar has attached, unless with the consent and authority of the other, given after the bar has attached, or

given before with express reference to such a state of things, cannot take from the other his right of defense to an action for recovery of the debt." To the same effect are: *Biscoe v. James*, 10 Ark. 163; *Mason v. Howell*, 14 Ark. 199; *Grant v. Ashley*, 12 Ark. 762; *Wooddy v. State Bank*, 12 Ark. 780; *Borden v. Peay*, 20 Ark. 293; *True v. Andrews*, 35 Me. 183; *Parker v. Butterworth*, 46 N. J. L. 244; 50 Am. Rep. 407, where the New Jersey court, reasoning as did the court in *Biscoe v. Jenkins*, 10 Ark. 108, reaffirmed its adherence to *Whitcomb v. Whiting*, 2 Doug. 652, but refused to extend its application to the case at bar, wherein part payment was made after the bar had attached; *Long v. Miller*, 93 N. C. 227, following *Green v. Greensboro Female College*, 83 N. C. 449; 85 Am. Rep. 579; *Van Keuren v. Parmelee*, 2 N. Y. 523, 51 Am. Dec. 322, distinctly repudiating *Whitcomb v. Whiting*, 2 Doug. 652, and overruling previous New York cases which had sanctioned its doctrine; *Bogert v. Vermilya*, 10 Barb. 32; *Cocke v. Hoffman*, 5 Lea, 105; 40 Am. Rep. 23; *Phelps v. Stewart*, 12 Vt. 256; *Cochran v. Walker*, 82 Ky. 220; 56 Am. Rep. 891.

The theory upon which the majority of these cases proceed is that there is no such relation of agency existing between joint debtors as authorizes one to bind or prejudice another by part payment or acknowledgment either before or after the statute of limitations has run against the common debt. There are, however, cases which do not hesitate, as did the Arkansas and New Jersey courts, to carry the holding of *Whitcomb v. Whitney*, 2 Doug. 652, to its logical conclusion. In *Smith v. Caldwell*, 15 Rich. 365, the South Carolina court exhibited the same hesitation and put a similar limitation upon its previous holdings: Compare *Steele v. Jennings*, 1 McM. 297. The same distinction is recognized in *Cox v. Bailey*, 9 Ga. 467; 54 Am. Dec. 358; *Ellicott v. Nichols*, 7 Gill. 85; 48 Am. Dec. 546. In *Wheelock v. Doolittle*, 18 Vt. 440, 46 Am. Dec. 163, the court considered it wholly immaterial whether an acknowledgment was made before or after the joint debt was barred, reasoning thus: "If the principle is admitted, as it must be, that a sole debtor may revive a debt by an acknowledgment, made as well before as after the statute has run, and that one joint contractor, or partner, after the dissolution of a copartnership, may revive a debt against his joint contractors, or partners, it seems to follow that it can make no difference in the latter case, any more than in the former, whether it was made before or after the statute had run on the demand." This case was followed in *Mills v. Hyde*, 19 Vt. 59, 46 Am. Dec. 177, proceeding "upon the ground of a presumptive agency in one joint contractor to bind the whole; so that the act of one, in this respect, is the act of all." The defective reasoning of these cases is apparent. If we grant the two propositions stated in the first quotation, we are still some distance from the conclusion insisted upon, which is a distinct non sequitur, and as for the second case, it is not evident why it should be presumed that an agency of such a special and limited sort would survive the contract which created and supported it. Before the Revised Statutes of Massachusetts it seems to have been held that one of several joint debtors, by an acknowledgment, could

take a barred joint debt out of the statute: *White v. Hale*, 20 Pick. 291; 15 Am. Dec. 209. In *McClurg v. Howard*, 45 Mo. 365, 100 Am. Dec. 378, it is said that American courts in adopting the English doctrine seem not to have drawn the distinction under consideration, but it is doubted if the rule would apply in case of a part payment after the debt had been barred. In the late case of *Cowhick v. Shingle*, 5 Wyo. 87, 63 Am. St. Rep. 17, the court in discussing the question said: "In some of the above cases the acknowledgment or partial payment relied upon to take the case out of the statute was made before the bar of the statute had become complete; but, in my judgment, there is no distinction in principle between the legal effect of acknowledgment or payment made before or after the bar of the statute had attached; in either case the legal effect thereof is to create a new cause of action": See, also, *Allen v. O'Donald*, 28 Fed. Rep. 17; *Pike v. Warren*, 15 Me. 390; *Willoughby v. Irish*, 35 Minn. 63; 59 Am. Rep. 297; *National Bank v. Cotton*, 53 Wis. 31. *Sigourney v. Drury*, 14 Pick. 387, is a leading case upholding Lord Mansfield's decision, and is sometimes cited as sanctioning an application of the rule where the payment or acknowledgment is made after the bar of the statute has attached. Shaw, chief justice, however, in his opinion, disclaims any desire to affirm such a proposition. "And we consider it a material circumstance," he says, "that the payment was made before the statute took effect, and do not mean to give any opinion as to the effect of payment of interest or principal by one, to affect the liability of others, after the parties are exonerated by lapse of time and the operation of the statute. There is an obvious difference between the effect of a payment within the term, which shall continue an existing liability in force, and such payment made after the liability is barred, to revive and create a new liability." From the foregoing review of cases it is plain that our courts recognized this "obvious difference," and stopped short of applying the ruling of *Whitcomb v. Whiting*, 2 Doug. 652, in such cases.

Where Payment or Acknowledgment is Made Before the Statute Has Run, we find the real conflict of opinion, which is simply the disagreement between the courts which follow, and those which reject *Whitcomb v. Whiting*. At the head of the former we may place *Sigourney v. Drury*, 14 Pick. 387, wherein Chief Justice Shaw expressly declines to cite the English case as authority, but adopts its holding in effect. The opinion in this case is an excellent discussion of the question. *Bell v. Morrison*, 1 Pet. 351, quoted above, is a leading case upholding the opposite view, which, being influenced somewhat by the local laws of Kentucky, and distinguishable on account of its facts, is to some extent weakened as authority. Leaving out of consideration cases where part payment or acknowledgment is made by one joint debtor as the authorized agent of another, and those in which the claim is barred before the part payment or acknowledgment is made, we find an imposing array of cases holding that one joint debtor has authority by payment, new promise, or admission to extend the bar of the statute as to the joint debt, not only for himself, but for his codebtors, for whom their joint rela-

tion makes him agent: *Bound v. Lathrop*, 4 Conn. 336; 10 Am. Dec. 147; *Austin v. Bostwick*, 9 Conn. 496; 25 Am. Dec. 42; *Clark v. Sigourney*, 17 Conn. 511; *Caldwell v. Sigourney*, 19 Conn. 37; *Bissell v. Adams*, 35 Conn. 299; *Beardsley v. Hall*, 36 Conn. 270; 4 Am. Rep. 74; *Cox v. Bailey*, 9 Ga. 467; 54 Am. Dec. 358; *Boult v. Sarpy*, 30 La. Ann. pt. 1, 494, where the promise was in solido; *Getchell v. Heald*, 7 Me. 26; *Dinsmore v. Dinsmore*, 21 Me. 433; *Shepley v. Waterhouse*, 22 Me. 497; *Ellicott v. Nicholls*, 7 Gill, 85; 48 Am. Dec. 546; *Schindel v. Gates*, 46 Md. 604; 24 Am. Rep. 526; *Burgoon v. Bixler*, 55 Md. 384; 39 Am. Rep. 417; *Hunt v. Bridgham*, 2 Pick. 581; 13 Am. Dec. 458; *Frye v. Barker*, 4 Pick. 381; *Sigourney v. Drury*, 14 Pick. 387; *Whitaker v. Rice*, 9 Minn. 13; 86 Am. Dec. 78, where such effect is allowed to part payment, but denied as to a new promise or acknowledgment: *Craig v. Callaway County Court*, 12 Mo. 94, weakened by the dissenting opinion of McBride, justice; *Lawrence County v. Dunkle*, 35 Mo. 395; *McClurg v. Howard*, 45 Mo. 365; 100 Am. Dec. 378; *Disborough v. Bidleman*, 21 N. J. L. 677; *Corlies v. Fleming*, 30 N. J. L. 349; *Merritt v. Day*, 38 N. J. L. 32; 20 Am. Rep. 362; *Casebolt v. Ackerman*, 46 N. J. L. 169; *Reid v. McNaughton*, 15 Barb. 168, where *Whitcomb v. Whiting*, 2 Doug. 652, was reaffirmed and *Van Keuren v. Parmalee*, 2 Const. 523 (later affirmed in 2 N. Y. 524; 51 Am. Dec. 322), refused adherence; *Davis v. Coleman*, 7 Ired. L. 424; *Lowe v. Sowell*, 3 Jones, 67; *Green v. Greensboro Female College*, 83 N. C. 449; 85 Am. Rep. 579; *Moore v. Beaman*, 111 N. C. 328; *Zent v. Heart*, 8 Pa. St. 337; *Turner v. Ross*, 1 R. I. 88; *Perkins v. Barstow*, 6 R. I. 505; *Woonsocket Institution v. Ballou*, 16 R. I. 351; *Beltz v. Fuller*, 1 McCord, 541; 10 Am. Dec. 693; *Steele v. Jennings*, 1 McMull. 297; *Silman v. Silman*, 2 Hill (S. C.), 416; *Smith v. Caldwell*, 15 Rich. 365.

Opposed to the cases just cited are the later and better decisions holding that, except in the case of a subsisting partnership, one joint debtor shall not have the power to deprive his codebtors of the benefit of the statute by his own promise or admission made without their consent: *Bell v. Morrison*, 1 Pet. 352; *Bergman v. Bly*, 66 Fed. Rep. 40; *Caruthers v. Mardi*, 3 Ala. 599; *Lowther v. Chappell*, 8 Ala. 353; 42 Am. Dec. 643; *Knight v. Clements*, 45 Ala. 89; 6 Am. Rep. 693; *Miller v. Miller*, MacA. & M. 109; 48 Am. Rep. 738; *Tate v. Clements*, 16 Fla. 339; 26 Am. Rep. 709; *Hunter v. Robertson*, 30 Ga. 479, where payment by the maker of a note was held not to bind an indorser, not consenting thereto; this in the face of the declared adherence of Georgia courts to *Whitcomb v. Whiting*, 2 Doug. 652; *Norton v. Colby*, 52 Ill. 202; *Kallenbach v. Dickinson*, 100 Ill. 427; 39 Am. Rep. 47; *Davis v. Mann*, 43 Ill. App. 301; *Yandes v. Lefavour*, 2 Blackf. 371; *Bottles v. Miller*, 112 Ind. 584; *Meltzler v. Todd*, 12 Ind. App. 381; 54 Am. St. Rep. 531; *Steele v. Souder*, 20 Kan. 39; *Davis v. Clark*, 58 Kan. 815; *Cochran v. Walker*, 82 Ky. 220; 56 Am. Rep. 891; *Reynolds v. Rowley*, 2 La. Ann. 890; *Gosserand v. Lacour*, 8 La. Ann. 75; *Stowers v. Blackburn*, 21 La. Ann. 127; *Succession of Voorhies*, 21 La. Ann. 659, where payment by a surety was not allowed to interrupt prescription as to his principal; *Wellman v. Southard*, 30 Me. 425, decided under the Revised Statutes

abrogating the rule of *Whitcomb v. Whiting*, 2 Doug. 652; *Odell v. Dana*, 33 Me. 182; *Lingan v. Henderson*, 1 Bland, 236; *Faulkner v. Bailey*, 123 Mass. 588, decided under the Revised Statutes changing the rule laid down in *Sigourney v. Drury*, 14 Pick. 387, and previously adhered to in Massachusetts; *Thompson v. Richards*, 14 Mich. 172; *Rogers v. Anderson*, 40 Mich. 290; *Willoughby v. Irish*, 35 Minn. 63; 59 Am. Rep. 297; *Foute v. Bacon*, 24 Miss. 156; *Briscoe v. Anketell*, 28 Miss. 361; 61 Am. Dec. 553; *Mayberry v. Willoughby*, 5 Neb. 368; 25 Am. Rep. 491; *Exeter Bank v. Sullivan*, 6 N. H. 124; *Kelley v. Sanborn*, 9 N. H. 46; *Whipple v. Stevens*, 22 N. H. 219; *Van Keuren v. Parmelee*, 2 N. Y. 523; 51 Am. Dec. 322; which put an end to the previous vacillation of New York courts by repudiating the doctrine of *Whitcomb v. Whiting*, 2 Doug. 652; *Shoemaker v. Benedict*, 11 N. Y. 126; 62 Am. Dec. 95; *Gould v. Cayuga Co. National Bank*, 86 N. Y. 75; *Campbell v. Brown*, 86 N. C. 376; 41 Am. Rep. 464, wherein the court, though reaffirming its adherence to the English case upon the ground of *stare decisis*, refused to apply the rule so as to allow one joint obligor to bind or prejudice another by a mere acknowledgment, though, had he made a part payment, the rule would have been held to apply; *Le Duc v. Butler*, 112 N. C. 458, refusing to allow a part payment by an indorser to repel the bar of the statute as to the maker of a note "because there was not a community of interest between them"; *Palmer v. Dodge*, 4 Ohio St. 21; 62 Am. Dec. 271; *Hance v. Noble*, 25 Ohio St. 349; *Levy v. Cadet*, 17 Serg. & R. 126; 17 Am. Dec. 650; *Coleman v. Fobes*, 22 Pa. St. 156; 60 Am. Dec. 75; *Bush v. Stowell*, 71 Pa. St. 208; 10 Am. Rep. 694; *Clark v. Burn*, 86 Pa. St. 502; *Walters v. Krafts*, 23 S. C. 578; 55 Am. Rep. 44, establishing a new rule of decision in South Carolina; *Belote v. Wynne*, 7 Yerg. 533; *Muse v. Donaldson*, 2 Humph. 166; 36 Am. Dec. 309; *Cowbick v. Shingle*, 5 Wyo. 87; 63 Am. St. Rep. 17.

The foregoing citations show in a graphic manner the gradual convergence of the opposing lines of authority which has taken place, resulting in an almost unanimous repudiation of Lord Mansfield's unfortunate decision in *Whitcomb v. Whiting*, 2 Doug. 652. In some states, legislation was necessary to assist the courts out of the rut into which they had fallen, as was the case in Massachusetts and Maine. Similar statutes are in force in most of the states, which follow closely Lord Tenterden's act, a statute which, in England, limited the effect of the decision in *Whitcomb v. Whiting*, 2 Doug. 652, to partial payments. Even this limited effect was taken away by the mercantile law amendment act, passed in 1856. In other states, as in New York and South Carolina, the court vacillated for some time before finally opposing the English rule, while in others, which yet adhere to their earlier decision, we find the courts, while admitting their established rules to be contrary to the weight of authority, yet insisting that until legislation relieves them they cannot change their decisions: *Woonsocket Institution v. Ballou*, 16 R. I. 351; *Le Duc v. Butler*, 112 N. C. 458. States which adopted the now exploded theory that joint contractors by virtue of their common liability and interest are agents for each other to the extent of Lord Mansfield's contention, have from the first recognized

its pernicious possibilities, for they have been ever anxious to restrict its application as much as consistency would allow: See *Le Duc v. Butler*, 112 N. C. 458; *Campbell v. Brown*, 86 N. C. 376; 41 Am. Rep. 464; *Powers v. Southgate*, 15 Vt. 471; 40 Am. Dec. 691; *Gardiner v. Nutting*, 5 Me. 140; 17 Am. Dec. 211; *Hunter v. Robertson*, 80 Ga. 479; *Whitaker v. Rice*, 9 Minn. 13; 86 Am. Dec. 78.

To understand why the discarded doctrine was formulated at first, it is only necessary to observe the change in the attitude of the courts toward statutes of limitation, which has taken place since *Whitcomb v. Whiting*, 2 Doug. 652, was decided. That such statutes are now regarded as statutes of repose and not statutes of presumption, is a rule so well settled that a citation of authorities supporting it would be superfluous. In former times, there was a pronounced indisposition in courts of justice to carry the wholesome provisions of the statute of limitations into effect: *Levy v. Cadet*, 17 Serg. & R. 128; 17 Am. Dec. 650. "The statute of 21 James I. chapter 16, which limited actions on promises to six years, was not received very well by the legal profession," says Bronson, justice in *Van Keuren v. Parmelee*, 2 N. Y. 523, 51 Am. Dec. 322, "and, although the early decisions under it are not open to much observation, it was not long before the courts began to regard the statute with disfavor, and to resort to the most subtle constructions for the purpose of restricting its influence. . . . At a later period, and since the commencement of the present century, the courts began to regard this as a beneficial statute—a statute of repose—and commenced the difficult task of retracing their steps." The wisdom and beneficence of the law were not entirely comprehended and the defense afforded by it was regarded as a dishonorable one: *Bell v. Morrison*, 1 Pet. 351. This misapprehension was prevalent in England when *Whitcomb v. Whiting*, 2 Doug. 652, was decided. The statute was construed as raising merely a presumption of payment which was easily rebuttable, so easily indeed that a debtor could with difficulty deny an old debt without saying enough to take the case out of the statute: *Van Keuren v. Parmelee*, 2 N. Y. 524; 51 Am. Dec. 322. This construction of the statute, opposed to its letter and spirit, prevailed for more than a century, and since Lord Mansfield's decision was based upon it, its standing as an authority has passed away with the theory which afforded it support: *Kallenbach v. Dickinson*, 100 Ill. 427; 39 Am. Rep. 47.

Who are Joint Debtors—Maker and Indorser.—In the principal case, it is held that the maker and indorser of a note are not co-obligors: *Maddock v. Duncan*, 143 Mo. 613; ante, p. 678. This is upheld by other cases. Thus, in *Hunter v. Robinson*, 80 Ga. 479, it is said: "The contract of the indorser is a new and independent one from that of the maker. While there is, to a certain extent, a privity between them, there is not a community of interest in all respects. The indorser is bound to the extent of his contract, and according to its terms; that which will discharge an indorser will not always discharge a joint obligor": *Dean v. Munroe*, 32 Ga. 28. Indorsers are not jointly liable with the makers, their contract being independent of, and collateral to, that of the makers: *Gardiner v. Nut-*

ting, 5 Me. 140; 17 Am. Dec. 211. Joint acceptors of a bill constitute a class; drawers another; but there is not such a community of interest between them as that a payment by an acceptor would bind a drawer: *Le Duc v. Butler*, 112 N. C. 458. A party cannot, after the execution and delivery of a note, unless in pursuance of an arrangement at the time of the execution and delivery, become a joint promissor and maker of it: *Monson v. Drakeley*, 40 Conn. 552; 16 Am. Rep. 74. The question as to who are joint debtors is a difficult one, and could be treated at considerable length. The cases are not in accord, and it is hard to draw generalizations from them.

Principal and Surety.—The relation of principal and surety has been generally held to be one of joint liability: *Lowther v. Chappell*, 8 Ala. 353; 42 Am. Dec. 643; *Caldwell v. Sigourney*, 19 Conn. 37; *Shepley v. Waterhouse*, 22 Me. 497; *Frye v. Barker*, 4 Pick. 381; *Sigourney v. Drury*, 14 Pick. 387; *Whitaker v. Rice*, 9 Minn. 13; 86 Am. Dec. 78; *Green v. Greensboro Female College*, 83 N. C. 449; 35 Am. Rep. 579. Cosureties are held to be joint debtors: *Walsh v. Miller*, 51 Ohio St. 462; *Wolf v. Finks*, 1 Pa. St. 435; 44 Am. Dec. 141; and sureties on a promissory note are presumed to be cosureties: *Baldwin v. Fleming*, 90 Ind. 177.

Husband and Wife are joint debtors in some cases: *Stevenson v. Craig*, 12 Neb. 464. By statute in Iowa they are jointly and severally liable for family expenses: *Murdy v. Skyles*, 101 Iowa, 549; 63 Am. St. Rep. 411; but they are not joint contractors as to debts of the wife contracted before coverture: *Powers v. Southgate*, 15 Vt. 471; 40 Am. Dec. 691; *Moore v. Leseur*, 18 Ala. 606. So a part payment by a wife upon her husband's note, not authorized by him, will not extend the bar of the statute as to him: *Butler v. Price*, 110 Mass. 97. No such authority on the part of one to bind the other flows from the marital relation: *Powers v. Southgate*, 15 Vt. 471; 40 Am. Dec. 691; *Butler v. Price*, 110 Mass. 97. Where an exercise of such authority by one is acquiesced in or assented to by the other, the latter is of course bound thereby: *Orcutt v. Berrett*, 12 La. Ann. 178.

Executors and Administrators.—The extent to which coexecutors and coadministrators may bind one another and the estate is a close question. The general rule is that the admission or acknowledgment of one of several executors or administrators will not bind the rest: *Caruthers v. Mardis*, 8 Ala. 599; *Pitts v. Wooten*, 24 Ala. 474; *Conoway v. Spicer*, 2 Harr. 425; *Fritz v. Thomas*, 1 Whart. 66; 29 Am. Dec. 39; *Peck v. Botsford*, 7 Conn. 172; 18 Am. Dec. 92. Though the contrary is also held: *Hord v. Lee*, 4 T. B. Mon. 36; *Heath v. Grenell*, 61 Barb. 190; *Johnson v. Beardslee*, 15 Johns. 8; *Briggs v. Starke*, 2 Mill. 111; 12 Am. Dec. 659. A promise by one administrator was held to take the case out of the statute, though made pending a joint administration, if through the decease of his coadministrator he later became sole representative of the estate: *Hall v. Darrington*, 9 Ala. 502. The power of the executor or administrator of one joint debtor to bind a surviving joint debtor by acknowledgment or part payment has also been brought in question. Such power was denied in *Hathaway v. Haskell*, 9 Pick. 42,

the court saying in part: "Here the joint interest is dissolved by the principal in the note, and it would be stepping beyond the line of precedents to admit the declarations of his administrator to bind the living partner." Reasoning in a similar manner, it was held that payment by a surviving obligor on a joint and several bond would not take the bond out of the statute as against the heirs of the deceased co-obligor: *Disborough v. Bidelman*, 21 N. J. L. 677. For a contrary doctrine, see *County of Vernon v. Stewart*, 64 Mo. 408; 27 Am. Rep. 250; *Zervis v. Unnerstall*, 29 Mo. App. 474; *Sutherland v. Roberts*, 4 Or. 378.

Acquiescence by Debtor in Acts of Codebtor.—In the jurisdictions where an agency is not implied between joint debtors, one joint debtor is not bound by the acts or admissions of his codebtor unless he has expressly or impliedly made them his own. So it must frequently be decided as to what amounts to the necessary ratification or assent. A husband who tacitly assents to an acknowledgment of a debt made in his presence by his wife interrupts prescription against the debt: *Orcutt v. Berrett*, 12 La. Ann. 178. Where one joint debtor, a principal or surety, seeing or knowing of a payment or admission or acknowledgment of the joint debt by his codebtor, acquiesces therein, he thereby takes the debt out of the statute as to himself: *Whipple v. Stevens*, 22 N. H. 219; *Mainzinger v. Mohr*, 41 Mich. 685; *Glick v. Crist*, 37 Ohio St. 388; *Wesner v. Stein*, 97 Pa. St. 322; or a subsequent ratification, made with full knowledge of the facts, will be sufficient: *Matter of Petrie*, 82 Hun, 62. Where a surety makes a part payment as agent for his principal, but does not disclose his agency, he takes the case out of the statute as to himself: *Holmes v. Durell*, 51 Me. 201; but where he discloses the agency under which he acts, he does not interrupt the running of the statute in his favor: *Bailey v. Corliss*, 51 Vt. 366. Where the surety receives money from the principal in the presence of the payee, to whom he at once hands the money, it becomes a question of the intention and understanding of the parties, whether the bar of the statute is removed as to the surety: *Green v. Morris*, 58 Vt. 35. An offer by a joint debtor to pay half of the barred debt and a refusal to pay more will not remove the attached bar of the statute as to the whole debt: *Phelps v. Stewart*, 12 Vt. 256. Where an indorser sued upon a promissory note alleges in his answer that the amount due should be reduced by payments made thereon by the maker, he does not thereby estop himself from pleading the statute of limitations, provided such payments were not made by his direction or have not been ratified by him: *McMullen v. Rafferty*, 24 Hun, 363.

CASES
IN THE
SUPREME COURT
OF
NORTH CAROLINA.

ALBERT v. MUTUAL LIFE INSURANCE COMPANY.

[122 NORTH CAROLINA, 92.]

INSURANCE—LIFE—INSURABLE INTEREST.—A policy of life insurance payable to one who has no interest in the life of the insured is valid and enforceable when the policy is taken out in good faith and the premium paid thereon by the insured.

INSURANCE—MISREPRESENTATIONS.—Under the statutes of North Carolina, statements contained in any application for a policy of insurance, or in the policy itself, are representations and not warranties; and, if misrepresentations are made, they do not vitiate the policy, unless they materially contribute to the loss or fraudulently evade the payment of an increased premium.

PRINCIPAL AND AGENT.—ADMISSIONS of an agent while he has the business in contest in hand are competent evidence against the principal.

INSURANCE—LIFE—POLICY AS EVIDENCE.—In an action to recover on a life insurance policy, the beneficiary may offer such policy in evidence without the application therefor, as the policy constitutes the contract upon which the suit is brought, and the application is no part of the policy and is in the possession of the defendant.

INSURANCE—LIFE—EXPERT EVIDENCE.—In an action on a policy of life insurance, expert physicians who have personally examined the insured, and who as medical examiners for the insurer have passed upon the application upon which the policy is issued, may testify as to what they mean by the use of the word "paralysis" in their reports to the insurer.

INSURANCE—LIFE—DEDUCTION OF UNPAID PREMIUM.—Under a life insurance policy, the premium on which is payable annually in advance, of which only one quarterly installment has been paid at the time of the death of the insured, the insurer is entitled to have the amount of premium remaining due for the current year deducted from the amount of the policy, before paying it.

W. B. Rodman, for the appellant.

C. F. Warren and J. H. Small, for the appellee.

⁹⁴ DOUGLAS, J. This is an action brought on a policy of insurance issued upon the life of Margaret A. Gardner, who was the stepmother of the feme plaintiff, to whom the policy was payable on its face. The insured died within two months after the issuance of the policy, and the defendant refuses to pay the same, alleging that the plaintiff husband had paid the premium and that as neither of the plaintiffs had any insurable interest in the policy, it was void as a wagering contract.

The jury, as instructed by the court, found that the plaintiffs had no insurable interest; but they also found that the insured had herself taken out the policy and paid the premium. This finding, in support of which there was at least more than a scintilla of evidence, disposes of that defense and of all exceptions based thereon. It is, therefore, not necessary for us to decide whether a stepdaughter has an insurable interest; and therefore the cases of *Burbage v. Windley*, 108 N. C. 357, and *Trinity College v. Travelers' Ins. Co.*, 113 N. C. 244, have no application. In those cases the premium was paid by the beneficiary, while in the case at bar the premium was paid by the insured, as found by the jury. There can be no doubt that a policy of insurance is valid when taken out in good faith and the premium paid thereon by the insured.

The principle is well stated in *Campbell v. Wilmington etc. Ins. Co.*, 98 Mass. 381, 389, where the beneficiary was the sister in law of the insured, as follows: "The policy in this case is upon the life of Andrew Campbell. It was made upon his application; it issued to him as the assured; the premium was paid by him; and he thereby became a member of the defendant corporation. It is the interest of Andrew Campbell in his own life that supports the policy. The plaintiff did not, by virtue of ⁹⁵ the clause declaring the policy to be for her benefit, become the assured. She is merely the person designated by agreement of the parties to receive the proceeds of the policy upon the death of the assured. . . . It was not necessary, therefore, that the plaintiff should show that she had an interest in the life of Andrew Campbell, by which the policy could be supported as a policy to herself as the assured." The same principle is recognized in 1 *May on Insurance*, sec. 112; 2 *May on Insurance*, sec. 399e; 2 *Beach on Insurance*, sec. 853; *Bliss on Insurance*, sec. 26; *Scott v. Dickson*, 108 Pa. St. 6, 16; 56 Am. Rep. 192.

The defendant in its answer further alleges that the insured gave false answers in her application, as to her age, her health, and certain diseases which she is supposed to have had; and that,

as such answers became warranties, they absolutely nullified the policy. The defendant is doubly unfortunate in this part of its answer, as the jury have denied its allegations of fact, and we feel compelled to overrule its conclusions of law. The act of March 4, 1893, chapter 299, of the Public Laws of 1893, provides as follows: "Section 8. All contracts of insurance, the application for which is taken within this state, shall be deemed to have been made within this state and subject to the laws thereof."

"Section 9. All statements of descriptions in any application for a policy of insurance, or in the policy itself, shall be deemed and held representations and not warranties: nor shall any misrepresentation, unless material or fraudulent, prevent a recovery on the policy." This law applies to all policies of insurance, both of fire and of life; and unless such misrepresentations materially contribute to the loss, or fraudulently evade the payment of the interested premium, they do ⁹⁸ not vitiate the policy. Ordinarily, these are questions of fact for the jury and not for the court.

We see no error in the refusal of the court to submit the issues tendered by the defendant, as they are practically covered by the issues that were submitted. Of course, if the insured herself took out the policy and paid the premium, the policy was not taken out and the premium was not paid by either of the plaintiffs. Again, we find that there was sufficient evidence on these issues to go to the jury, and we see no reason to disturb their verdict, as no material error appears in the charge, which was full, fair, and intelligible. Nearly all of the defendant's numerous prayers were given.

The first, tenth, eleventh, and twelfth were properly refused, as they would practically have left nothing for the jury to determine. It is impracticable to answer in detail each of the twenty-three exceptions filed by the defendant, and it would be equally useless to do so. The motion to nonsuit the plaintiff under chapter 109 of the Laws of 1897, the fons malorum that has already given us so much trouble, was properly refused, as there was ample evidence to go to the jury.

The second and third exceptions cannot be sustained, as the same facts were testified to by Sudderth himself, the defendant's own witness. Moreover, the admissions of an agent, while he has the business in hand, are competent against the principal: Howard v. Stubbs, 51 N. C. 372; McComb v. North Carolina R. R. Co., 70 N. C. 178; Southerland v. Wilmington etc. R. R. Co., 106 N. C. 100.

As to exception 4, the plaintiffs had a right to offer in evidence the policy of insurance, as it was the contract upon which the suit was brought, and were not required to introduce the application, which was no ^{part} part of the policy, and which moreover was in the possession of the defendant.

We see no error in the ruling out of leading questions and the questions allowed on the cross-examination of the defendant's witnesses.

The testimony of Doctors D. T. and Joshua Tayloe was competent. Both were expert physicians, were medical examiners of the defendant company, had passed upon the application, while one of them had personally made the examination. Particular objection was made to their explaining the meaning of the word "paralysis." Both were medical experts; but whether they were or not, they certainly are presumed to know what they themselves meant by the use of the word "paralysis" in their reports to the defendant company, which employed and paid them. It is a singular fact that the application was signed by the insured in blank, and entirely filled out by the agent of the defendant. It may seem singular that the insured should die so soon after the issuing of the policy, but it seems morally impossible that she should have had at that time the vast complications of diverse diseases alleged by the defendant without some of them being discovered by the examining physician, whose character and professional standing have not been questioned, and whose position as agent of the defendant would remove any suspicion of partiality toward the insured.

For these reasons, we see no error in the judgment so far as the amount of the policy itself is concerned, but from this amount should be deducted the unpaid portions of the premium for the current insurance year, that is, for the three remaining quarters. This is in exact accordance with the express terms of the contract, and does not seem to us an unreasonable stipulation. ^{us} As we understand it, all policies are calculated for the year beginning with the date of issue, and the entire yearly premium is primarily payable in advance. If the insurer indulges the insured by accepting quarterly payments, it is a favor to him, of which his representatives cannot take advantage to the prejudice of the insurer.

Therefore, the amount of the three unpaid quarters must be deducted from the amount of the policy in the nature of a setoff, and judgment rendered in favor of the plaintiffs, for the differ-

ence. The judgment of the court below is modified and affirmed.

INSURANCE—LIFE—INSURABLE INTEREST.—Payment of premiums on life insurance by the insured renders the policy valid, even though the beneficiary named in the policy has no insurable interest in the life of the insured: *Heinlein v. Imperial etc. Ins. Co.*, 101 Mich. 250; 45 Am. St. Rep. 409, and note; *Northwestern etc. Aid Assn. v. Jones*, 154 Pa. St. 99; 35 Am. St. Rep. 810, and note. Such transaction is not a wagering contract: *Hill v. United Life Ins. Assn.*, 154 Pa. St. 29; 35 Am. St. Rep. 807.

AGENCY—ADMISSIONS OF AGENT AS EVIDENCE.—Statements and admissions of an agent are not admissible against his principal, unless they are made at the time of the transaction to which they relate, and such transaction is within the scope of the agent's employment: *Empire Mill. Co. v. Lovell*, 77 Iowa, 100; 14 Am. St. Rep. 272, and note; or unless the agent was authorized by the principal to make them: *Jammison v. Chesapeake etc. Ry. Co.*, 92 Va. 327; 53 Am. St. Rep. 818. See *Giberson v. Patterson Mills Co.*, 174 Pa. St. 369; 52 Am. St. Rep. 823, and note.

INSURANCE—WARRANTIES AND REPRESENTATIONS—HOW DISTINGUISHED.—The material difference between a representation and a warranty is that the latter is a part of the contract, while the former is not: See monographic note to *Fowler v. Aetna Fire Ins. Co.*, 16 Am. Dec. 462-471, discussing the distinction. Stipulations in applications for insurance are to be considered representations, rather than warranties, in all cases where there is any room for construction: *Daniels v. Hudson River Fire Ins. Co.*, 12 Cush. 416; 59 Am. Dec. 192, and note; *Wheaton v. North British etc. Ins. Co.*, 76 Cal. 415; 9 Am. St. Rep. 216.

NEAL v. PENDER-HEYMAN HARDWARE COMPANY.

[122 NORTH CAROLINA, 104.]

CONTRACTS—BREACH—MEASURE OF DAMAGES.—If one violates his contract, he is liable for such damages as are caused by the breach, and such as may reasonably be presumed to have been in the contemplation of the parties at the time that the contract was made.

AGENCY—KNOWLEDGE OF AGENT AS KNOWLEDGE OF PRINCIPAL.—If an agent knows, or by ordinary care can ascertain, the purpose for which implements contracted to be furnished are to be used, his knowledge is the knowledge of his principal.

CONTRACTS—BREACH—AGENCY—DAMAGES.—A manufacturer who makes, and his agent who sells, flues for curing tobacco in a locality where tobacco is cultivated, are presumed to know that if it is not cut and cured in apt time serious loss is the necessary consequence, and the principal is liable for such loss caused by the breach of a contract made by his agent to furnish flues for the curing of such tobacco.

J. L. Bridgers, for the appellant.

Battle and Thorne, for the appellee.

¹⁰⁶ FAIRCLOTH, C. J. The defendant was engaged in manufacturing flues for curing tobacco raised by farmers, and by its agent, Taylor, contracted to deliver flues to the plaintiff at Whitakers, North Carolina, on July 1, 1895, with bill of lading attached, no money to be paid till the flues were delivered. The flues were not delivered on July 1st, but on July 15th the defendant wrote to the plaintiff: "Flues are ready for shipment. Send us five dollars on the account and they will be sent at once." The plaintiff sent five dollars, and on July 27th received acknowledgment of the receipt of five dollars, with statement, "Will ship at once." On August 2d the plaintiff wrote: "Please ship by first freight. If you cannot, return my money at once, so I can buy elsewhere"; and on August 5th, "Please return my money to me at once. I want it so I can buy my flues at Rocky Mount. Don't fail to send by first mail." After some time the money was returned and the flues were never sent.

The plaintiff, and others who inspected the crop in the field, testified that unless tobacco was cured in time ¹⁰⁶ it was always damaged, and that when the correspondence ceased the crop was then damaged by reason of delay in cutting and curing it.

The plaintiff testified that he tried to buy flues at Rocky Mount and elsewhere, but could not do so; that the damage continued by delay, and that he borrowed some old cast-off flues in bad condition from a neighbor, and that his tobacco was injured by the use of such flues.

The defendant contends that the plaintiff has shown no case for special damages, inasmuch as they did not flow naturally from the breach of contract, and that he had failed to show that the defendant had knowledge that special damages would result from a failure to deliver the flues according to contract, and the defendant's exception is that his honor refused to so charge the jury.

The court charged that the plaintiff must prove, by preponderance of evidence, the contract, its breach, damage, the manner and amount of damage, and explained fully the measure of damages, and submitted to the jury the evidence of the plaintiff's effort to get other flues after the breach, and his failure to do so.

The rule of damages has been stated thus: "Where one violates his contract he is liable for such damages as are caused by the breach, and such as may reasonably be presumed to have been in the contemplation of the parties at the time the contract was made": *Mace v. Ramsey*, 74 N. C. 11; *Rocky Mount Mills v. Wilmington etc. Ry. Co.*, 119 N. C. 693, 702; 56 Am. St. Rep. 682.

If the agent, Taylor, knew, or could by ordinary care have known, the purpose for which the flues were intended, his knowledge is the knowledge of his principal: *Hubbard v. Troy*, 24 N. C. 134; *Anniston Nat. Bank v. School Committee*, 118 N. C. 383.

¹⁰⁷ We think it must be common knowledge in localities where tobacco is cultivated that, if it is not cut and cured in apt time, serious loss is the necessary consequence, as well as the proper season for cutting and curing, and we must assume that this common knowledge was present with the agent and the defendant who was engaged in manufacturing the flues for such purposes.

We are of opinion that the charge of the court in substance responded to the request of the defendant, and we see no error in it.

Affirmed.

DAMAGES FOR BREACH OF CONTRACT.—Damages for breach of contract should be such as may fairly and reasonably be considered as arising naturally—that is, according to the usual course of things from such breach—or such as may reasonably be supposed to have been in contemplation of both parties at the time they made the contract as the probable result of its breach: *Paducah Lumber Co. v. Paducah Water etc. Co.*, 89 Ky. 340; 25 Am. St. Rep. 536; *Spencer v. Hamilton*, 113 N. C. 49; 37 Am. St. Rep. 611, and note; *State v. Andrews*, 39 W. Va. 35; 45 Am. St. Rep. 884, and note.

AGENCY—NOTICE TO AGENT AS NOTICE TO PRINCIPAL.—Notice or knowledge coming to an employé in the line of his service is notice to the principal: *Higman v. Camody*, 112 Ala. 257; 57 Am. St. Rep. 33, and note; *Mullanphy Sav. Bank v. Schott*, 135 Ill. 655; 25 Am. St. Rep. 401. An agent is presumed to have communicated such knowledge to his principal: *Enos v. St. Paul etc. Ina. Co.*, 4 S. Dak. 639; 46 Am. St. Rep. 796.

HOUSTON v. THORNTON.

[122 NORTH CAROLINA, 365.]

CORPORATIONS—LIABILITY OF DIRECTORS FOR NEGLIGENCE.—It is negligence in the directors of a national bank to permit to be published false and fraudulent statements of the financial condition of the bank, whereby a person is induced to buy stock therein, for which such directors are directly liable to him, notwithstanding the appointment of a receiver upon the declared insolvency of the bank.

CORPORATIONS—LIABILITY OF DIRECTORS FOR FALSE STATEMENTS.—It is negligence in the directors of a bank to declare dividends wrongfully, and they are directly liable to a person injured thereby, whether they directly participate in the fraud or not.

CORPORATIONS—LIABILITY OF DIRECTORS FOR FALSE STATEMENTS.—If false and fraudulent statements of the

condition of a corporation are put forth under the authority of the directors, it is not necessary that they should know them to be such in order to hold them liable for damages sustained by anyone dealing with the corporation, relying upon the truth of such reports.

CORPORATIONS—LIABILITY OF DIRECTORS.—The liability of the directors of a bank for their negligence in permitting false and fraudulent statements as to the financial condition of the bank to be published and wrong dividends to be declared, cannot be restricted to one instance of negligence when there are more such instances in evidence.

CORPORATIONS—LIABILITY OF NONRESIDENT DIRECTORS FOR NEGLIGENCE.—The selection of nonresident bank directors of good character, whose names are a pledge of honest management, upon which the public makes deposits and buys stock of the bank, does not excuse such directors from liability for the negligence and mismanagement of the resident and managing directors, on the ground that, being nonresidents, they could not give proper attention to their duties, and by private arrangement it was agreed between all of the directors that they should not be required to do so.

A **SUMMONS** is issued when it is put out of the clerk's office under his sanction and authority, and given to an officer for the purpose of being served.

SUMMONS.—THE PRESUMPTION THAT A SUMMONS WAS ISSUED on the day it bears date is not rebutted by the fact that the sheriff's indorsement of its receipt by him bears a later date.

BURDEN OF PROOF.—STATUTE OF LIMITATION pleaded as a defense casts the burden of proof upon the plaintiff to show that his action was commenced within the time limited by such statute.

LIMITATION OF ACTIONS—ACCRUAL OF RIGHT OF ACTION.—If judgment is recovered against a stockholder in a national bank for an assessment under the individual liability imposed by the "national banking act" the stockholder's right of action against the directors of the bank through whose negligence he purchased the stock assessed, does not accrue with the payment of such judgment.

Womack and Hayes, for the appellant.

H. A. London, for the appellee.

³⁰³ **CLARK, J.** The issues tendered by the defendant presented the question whether there had been fraud and misrepresentation on the part of the defendants. Those settled by the court at the close of plaintiff's ³⁰⁷ evidence presented the inquiry whether there had been negligence and wrongful acts by which the plaintiff had been damaged. The latter were proper upon the pleadings.

The plaintiff complained that the board of directors of the People's National Bank, among whom were the defendants, in February, 1890, and at sundry other times, before and after, caused to be published reports of the status of the bank which showed it to be amply solvent, whereby the plaintiff was induced in April, 1890, to purchase eleven shares of the capital stock of

said bank, whereas at the times aforesaid the bank was hopelessly insolvent, and had been so for at least five years; that the said directors either knew this to be the true condition of the bank or with proper care could have known it. The complaint is full, and contains a detailed statement of the acts of negligence alleged against the defendant. The bank was declared insolvent on the 31st of December, 1890, and the receiver took charge in February, 1891. The plaintiff not only lost the whole sum (\$1,100) invested in the purchase of said eleven shares of the stock of the bank, but under the liability clause of the National Banking Act has been assessed fifty per cent on her stock, and a judgment has been obtained against her by the receiver for \$550 on that account in the federal court. The published statement of the bank, January 2, 1890, showed that the capital stock was \$125,000, the deposits \$87,300, the surplus \$32,000, and undivided profits \$6,795. The former cashier of the bank testified, without contradiction, that this statement was made by the order of the directors; that it was untrue; that there was no surplus, no undivided profits, and that the bank did not even have its capital stock; that, if the directors had examined the ³⁰⁸ papers, they would have known the insolvency of the bank; that, at that time, the president (Moore) owed the bank between \$100,000 and \$120,000; that one of the directors (Thornton) owed the bank about \$40,000, another director (McNeill) owed it \$20,000, and Starr, another director, owed it between \$6,000 and \$7,000—thus between \$166,000 and \$187,000 being due the bank from these officials, of whom McNeill was then known to be insolvent; that Moore was also insolvent and failed in November, 1890, and Thornton in the spring of 1891; that the bank never had a finance committee; that, in November, 1889, Moore owed the bank on his unsecured paper \$100,000, of which \$30,000 had been due three to ten years. It is needless to go through the evidence which shows the most culpable negligence on the part of the board of directors, for this is sufficiently shown by the above-recited facts if nothing further had been proved. At the meeting of the directors on January 14, 1890, a dividend of four per cent out of the profits was declared, all the directors being present, and the defendants voting for the declaration of the same, though this dividend, like all the other semi-annual dividends for the five years previous, was in fact paid out of the deposits and not out of the earnings.

The defendants asked the court to charge:

1. That upon the facts in evidence the plaintiff cannot re-

cover because of any negligence of the defendants, they being directors of a national bank in the hands of a receiver, becomes an asset of the bank for which the receiver alone can sue, and the jury will therefore answer the second issue "No." This prayer was properly refused. The wrong complained of is not one toward the company, not any negligence in the duty to guard its interests and to comply with the requirements ³⁶⁹ of the National Banking Act, but a wrong to the plaintiff in permitting a false and fraudulent statement of the condition of the bank to be published, whereby the plaintiff, trusting in the truth thereof and the high character of the defendants, was misled into parting with \$1,100 for the purchase of eleven shares of the capital stock of the company which at that time was worse than worthless. This is not a cause of action that under any circumstances could have passed to the receiver: 3 Thompson on Corporations, secs. 4304, 4132, 4144. If this action had been brought by a depositor, the settled doctrine of the law is that "if, in the pretended performance of duties imposed upon them by law, the directors of a bank used their official station to make false representations which are believed and acted upon by third parties, they are liable to respond for the injury done to the one defrauded thereby, and that the liability provided for in the National Banking Act cannot be deemed to preclude the right to maintain a common-law action for deceit for such false and fraudulent representation": Prescott v. Houghey, 65 Fed. Rep. 653, 659, which distinguishes Bailey v. Mosher, 63 Fed. Rep. 488; Delano v. Case, 121 Ill. 247, 2 Am. St. Rep. 81; 3 Thompson on Corporations, sec. 4304. The allegations and proof as to declaring dividends out of deposits and allowing an official to borrow more than one-tenth of the capital stock are not the basis of this action; if they were, then the receiver should have brought the action; but they are merely evidential to show the negligence whereby the plaintiff, not the bank, was injured and to support her action for injury to herself.

2. That the plaintiff cannot recover unless the jury shall believe from the evidence that these defendants ³⁷⁰ participated in the fraudulent statement made by other officers of the bank, and unless the plaintiff has shown such participation the jury will answer the second issue "No." Refused, and the defendants excepted.

There was no error in refusing this prayer. The ground of recovery is not the participation of the defendants in fraud, but that by their gross negligence they permitted the statements to

be put forth upon their authority showing the bank to be amply solvent, with large surplus, and the declaration of four per cent semi-annual dividends out of profits, when there has been no profits, as to all of which the defendants should have been informed. It was in evidence and not denied that all the directors were present when the dividend of January, 1890, was declared, and Starr alone voted "No," as to whom a nonsuit was entered. As was said in *Solomon v. Bates*, 118 N. C. 311; 54 Am. St. Rep. 725, and reaffirmed in *Solomon v. Bates*, 118 N. C. 321, and *Caldwell v. Bates*, 118 N. C. 323: "If false and fraudulent statements of the condition of the corporation are put forth under the authority of the directors, it is not necessary that they should know them to be such; it is their duty to know them to be true, and they are liable for damages sustained by anyone dealing with the corporation, relying upon the truth of such reports": 1 *Morse on Banking*, secs. 132, 137; *Kinkler v. Junica*, 84 Tex. 116. So salutary and just a rule is supported by ample authority elsewhere, and, if it were not, it is correct in itself and a just protection to which the public are entitled. It is not necessary, as the defendants asked the court to instruct the jury, that these defendants "participated in the fraudulent statements," but if the statements were given to the public by the authority of the board of directors (which is not controverted), and were in fact false and fraudulent, and the plaintiff relying thereon ³⁷¹ (as she had a right to do) was induced to buy stock, or had made deposits whereby she suffered injury, all the directors are liable, whether they "participated" in the fraud or not: *Arnison v. Smith*, L. R. 41 Ch. Div. 348; 3 *Thompson on Corporations*, sec. 4108.

The defendants further asked the court to instruct the jury that, if they should believe from the evidence that the directors used reasonable diligence in the management of the affairs of the bank, which is such as prudent men usually exercise in the management of their own affairs of a similar nature, then the plaintiff cannot recover, and the jury will answer the second issue "No." The court gave this prayer, with this addition, to which the defendants excepted, to wit: "Unless you should find that the defendants declared or paid dividends at the January meeting, 1890, out of the capital stock or deposits of the bank, and not out of the earnings, and the plaintiff was induced or misled by such declaration of dividends to purchase stock in the bank, and the defendants could have by the exercise of ordinary diligence known that the dividends were paid or declared out of the capi-

tal stock or deposits of the bank, and not out of the earnings of the bank, then you should answer the second issue 'Yea.' ” The defendants cannot complain of this modification, though the plaintiff had just ground to except (if it had been necessary) that the inquiry was restricted to one instance of negligence when there were so many others in evidence. Indeed, the court might well have told the jury that, if they believed the evidence, the defendants had not “used reasonable diligence in the management of the affairs of the bank.”

4. The defendants asked the court to charge that, if the jury shall believe that the defendants were selected ³⁷² by the stockholders, knowing that their residence away from the town of Fayetteville, at which place the bank was located, rendered it impracticable for them to give close personal attention to the affairs of the bank, and that by the action of the directors and stockholders it was made the duty of the other directors to look into the daily affairs of the bank, and that these directors were to give only a general and supervisory control over the affairs of the bank; that it was not their duty to pass upon the paper discounted by the bank, but that such duty was delegated by the directors to a committee of directors known as “the discount committee,” and that such delegation of powers is usual in national banks; that these directors performed all the duties assigned to them by the custom of the bank, which was well known to the stockholders; that the frauds of the officers of the bank could not have been discovered by the directors in the regular performance of their duties and without a close and critical examination into the book-keeping of the bank and the solvency of the papers held, then the plaintiff is not entitled to recover and the jury will answer the second issue “No.” The defendants’ exception to the refusal of this prayer cannot be sustained. The assumption of fact therein that the payment of semi-annual dividends out of the deposits for five years, and the discovery of the fact that nearly the entire capital and deposits were loaned to the president and three directors, and most of it without security, could not have been ascertained by the defendants in the proper discharge of their duty, is not sustained by the evidence. It was also in evidence that one of these borrowing officials was insolvent and two others were men of bad character, which devolved upon the defendants the duty of being even more than usually diligent. On the ³⁷³ contrary, the evidence shows them to have left the management entirely to those officials. But, aside from this, there is no principle of law or morals that

will permit the selection of nonresident directors of good characters, whose names shall be a pledge of honest management upon which the public shall make deposits and buy the stock of the bank, and then when the crash comes will excuse such directors from liability because, being nonresidents, they could not give proper attention to their duties, and by private arrangement it was agreed that they should not be required to do so. Such arrangement, if it had been shown, would not have released them from their duties as prescribed by act of Congress, nor from their common-law liability for negligence or fraud. There is no allegation or proof that these defendants were guilty of fraud or had actual knowledge of the frauds, or that they knew the representations in the published reports were fraudulent. On the contrary, the basis of the action is that these defendants were men of high character, who would not participate in or connive at fraud, and for that very reason, when the reports of the bank were published, the plaintiff, relying on the well-known character of these defendants, trusted implicitly to the correctness of such statements and was misled, to her damage \$1,100, into buying the eleven shares of the capital stock of the bank, which were wholly worthless, and entailed liability on her besides. It is no answer to this to say that the defendants themselves were also misled as to the condition of the bank and suffered loss. They had opportunity to know the true condition of the bank. They ought to have known. It was their duty to know. They should not have permitted statements to go out upon their authority as to the condition of the bank ³⁷⁴ which were untrue, and relying upon which the plaintiff was led into loss. It may be a hardship upon these defendants, but it would be a greater hardship upon the public and destructive of confidence in banks if directors of good character, whose names are useful in drawing patronage, are absolved from responsibility for fraudulent representations, whereby the public are duped and defrauded, because such directors had no actual knowledge of the frauds and did not participate in them. "Ignorance will not excuse when they had means of knowledge": *Shea v. Mabry*, 1 Lea, 319, 342; *Seale v. Baker*, 70 Tex. 283; 8 Am. St. Rep. 572; *United Society v. Underwood*, 9 Bush, 609; 15 Am. Rep. 731. Lord Erskine declared on a memorable occasion that "Morality may come in the cold abstract from the pulpit, but men smart practically under its lessons when courts and juries are the teachers." The courts hold that "culpable negligence [in such matters] is in law equivalent to fraud" (*Shea v. Mabry*, 1 Lea,

319) and the surest guaranty against it is the verdict of a jury for the damages inflicted.

There are several other exceptions for refusals to give prayers asked and to the instructions given, but what has been said is sufficient to dispose of them.

The only remaining exception is that as to the fourth issue the court charged: "The action was commenced by issuing the summons, and the summons was issued when it was put out from the clerk's office, by direction and under sanction and authority of the clerk, and given to the officer for the purpose of being served. If it was sent out or handed to some one else to give to the officer for the purpose of being served, this would be an issuing of the summons, but it must leave the office for this purpose by the direction, or under the sanction and authority, of the clerk." This charge is ³⁷⁵ correct and was taken from Webster v. Sharpe, 116 N. C. 466. The presumption that it was issued when it bears date is not rebutted by the bare fact of the date of the sheriff's indorsement of its receipt by him: Currie v. Hawkins, 118 N. C. 593.

The court further instructed the jury properly that the statute of limitations having been pleaded, the burden was upon the plaintiff to show that the action was commenced three years from December 31, 1890, which was admitted to be the date when the statute began to run: Parker v. Harden, 121 N. C. 57; House v. Arnold, 122 N. C. 220. The admission settles the date, but it is a question of grave doubt, if the point had been raised, whether the statute as to the plaintiff's cause of action began to run upon the mere declaration of insolvency of the bank, December 31, 1890, and did not in truth begin to run upon the actual discovery, later on (after the investigations of the receiver) that the bank was insolvent in the spring of 1890 at the time the incorrect statements were put forth: Code, sec. 155 (9).

Affirmed.

Douglas, J., dissents.

PLAINTIFF'S APPEAL.

CLARK, J. The facts are set out in the defendants' appeal. The plaintiff alleged that in addition to the ground of damage upon which she recovered a verdict, she had been assessed fifty per cent upon her stock by virtue of the liability clause in the National Banking Act, and she introduced a properly certified

transcript of a judgment obtained by the receiver of the bank upon such assessment in the United States circuit Court for \$550. It was in evidence that the plaintiff had not paid ³⁷⁶ anything on said judgment. She offered to prove that she was solvent and able to pay said judgment, and is still liable therefor. This was properly excluded by the court. Not till the plaintiff has paid the judgment will her cause of action on that account accrue, and the statute of limitations in favor of the defendants will begin to run from such payment.

No error.

CORPORATIONS—LIABILITY OF DIRECTORS TO THIRD PERSONS—REPRESENTATIONS AS TO SOLVENCY.—The most frequently recurring class of misrepresentations on the part of officers and agents of corporations concerns the solvency of the corporations which they represent, and the liability for such misrepresentations is discussed in the extended note to *Seale v. Baker*, 8 Am. St. Rep. 604-606. Such representations constitute fraud. Their purpose is immaterial, provided they accomplish some object of the corporation or the agent, and were made for the purpose of inducing some other person to act upon it: See monographic note to *Greenberg v. Whitcomb Lumber Co.*, 48 Am. St. Rep. 921; *Salmon v. Richardson*, 30 Conn. 360; 79 Am. Dec. 255. A director of a company is not liable for representations, false in fact, but not known to him to be so, made in published circulars of the company, on which his name appears only as one of the list of directors: *Wakeman v. Dalley*, 51 N. Y. 27; 10 Am. Rep. 551. Such representations, to be actionable, must be made with intent to deceive: See monographic note to *Hodges v. New England Screw Co.*, 53 Am. Dec. 649. We have already expressed the opinion that directors should be held to an exercise of reasonable diligence in their attention to duty, and should not escape liability for fraudulent representations in circulars issued over their names except by proof of ignorance of their falsity, and further proof that such ignorance was compatible with such reasonable diligence: See monographic note to *Greenberg v. Whitcomb Lumber Co.*, 48 Am. St. Rep. 921, 922.

PROCESS—SUMMONS—WHEN ISSUED.—Under a statute requiring that a summons shall be served by the sheriff, it is "issued" when it has been signed by the plaintiff or his attorney and deposited with the sheriff for service. Until then it has no vitality for any purpose: *White v. Johnson*, 27 Or. 282; 50 Am. St. Rep. 726.

LIMITATIONS OF ACTIONS—PLEADING STATUTE AS DEFENSE—BURDEN OF PROOF.—It is said by several text-writers that where the statute of limitations is set up in bar of a right of action, by a plea which is traversed, the burden of proof is on the plaintiff to show the commencement of the action within the statutory period. This statement is supported unqualifiedly by some of the earlier cases, though later cases differ with, or limit it: Extended note to *Pond v. Gibson*, 81 Am. Dec. 725, 726. See *Pond v. Gibson*, 5 Allen, 19; 81 Am. Dec. 724; *Shannon v. White*, 6 Rich. Eq. 96; 60 Am. Dec. 115, and note.

DURHAM FERTILIZER CO. v. MARSHBURN.

[122 NORTH CAROLINA, 411.]

APPEAL—ORDERS.—An order of the superior court overruling a motion to dismiss an appeal from a justice's judgment is not appealable.

APPEAL.—QUESTIONS OF JURISDICTION may be raised at any time and in any court where the case is pending. A motion to dismiss an appeal from a justice's judgment, based on want of proper service of process, may be made at any time in the superior court.

APPEAL—JURISDICTION.—If a justice of the peace has not obtained jurisdiction of a party by reason of the nonservice of process in a matter in which he has exclusive original jurisdiction, the superior court cannot, on appeal, obtain jurisdiction of such party by ordering a summons to issue to bring him before it. The superior court cannot create original jurisdiction on appeal.

PROCESS—SERVICE UPON NONRESIDENTS.—If a justice of the peace issues process for defendants residing outside the county, it must be issued or addressed to an officer of the county where it is to be served.

JUDGMENTS—IMPROPER SERVICE OF SUMMONS.—A summons illegally issued and illegally served does not bring the defendant into court. A judgment rendered upon such service is void.

JUDGMENT—IMPROPER SERVICE OF SUMMONS.—A justice's judgment against a nonresident defendant, on whom process was not served at least ten days before the return day, as required by statute, is void.

Stevens & Beasley, for the appellant.

J. D. Kerr, for the appellees.

412 FURCHES, J. This action was commenced before a justice of the peace of Duplin county. A part of the defendants named in the summons lived in Duplin county and a part of them in Sampson county. The summons was directed to "Any constable or other lawful officer of Duplin county." This summons was duly served on the defendants living in Duplin, but not on those living in Sampson. Upon the return of the summons, indorsed as above indicated, the case was continued to the twenty-fourth day of November, 1894, and an alias summons was issued by Woodward, the justice of the peace of Duplin, directed as the original was to "Any constable or other lawful officer of Duplin county." This duplicate was issued on the 19th of November, and on the 20th, Warren Johnson, a justice of the peace of Sampson county, being satisfied that Woodward, who issued the summons, was a justice of the peace of Duplin, indorsed it under section 872 of the code, and the sheriff of Sampson served the same on the 23d of November and returned it to Woodward in Duplin. The Samp-

son defendants, by an attorney, appeared before Woodward on the 24th and entered a special appearance, and moved to dismiss as to them. This motion was refused and the justice proceeded to judgment, and the said defendants appealed to the superior court.

In the superior court, the said defendants again entered a special appearance and moved to dismiss. This motion was refused, and the court ordered the clerk of the superior court of Duplin to issue a summons for these defendants to Sampson, which was done ⁴¹³ and served on said defendants. At the next term these defendants again renewed their motion to dismiss, which was allowed and the plaintiffs appealed.

It was contended here, in support of the plaintiff's appeal, that the original service was sufficient; if not, the service of the summons ordered by the court was; and that the defendants were estopped by their motion at the previous term of the court to dismiss—that it was *res judicata*.

The last position taken by the plaintiff would probably have to be sustained, as the defendants seem not to have noted an exception. This was all the defendants could have done, as it was not such a judgment as they could have appealed from, and in this respect differs from *Henry v. Hilliard*, 120 N. C. 479. But it is a jurisdictional question, and may be made at any time and in any court where the case is pending: *Lilly v. Purcell*, 78 N. C. 82.

The action having been commenced before a justice of the peace, in a matter in which that court had exclusive original jurisdiction, the superior court has no jurisdiction except by appeal. And it then only succeeds to the jurisdiction the justice of the peace had. The superior court cannot create jurisdiction. Where a defendant named was not before the justice, the court cannot by its order and process bring him into the superior court. This would be to create original jurisdiction in a matter where the exclusive original jurisdiction was before a justice of the peace. It is different in special proceedings commenced before the clerk, as he is considered but the hand of the court. They are commenced in the superior court before the clerk and are provided for by proper legislation, there being no constitutional provision to prevent such legislation, ⁴¹⁴ while the constitution expressly provides that the superior court shall not have such jurisdiction, except by appeal. It must therefore follow that the order of the court to the clerk to issue summons for these defendants was unauthorized, uncon-

stitutional, and invalid, being original process. This reasoning does not prevent the court from issuing process to bring executors, administrators, and the like, into court, where the parties they represent were properly before the justice's court and the case has come into the superior court by appeal.

This leaves the case to depend upon the original summons issued by Woodward, and its service upon the Sampson county defendants and the action of the justice thereon.

Originally, a justice of the peace had no authority to issue any process to any other county but his own. And although he has the power to do so now, it is a restricted legislative power: Code, sec. 871. And being a restricted legislative grant of power, when exercised, it must be strictly pursued. This section of the code provides that "no process shall be issued by any justice of the peace to any county other than his own," but he may issue process to any county in which any such nonresident defendant resides. This plainly provides that when the justice issues process for nonresident defendants, it must be issued—addressed—to the officer of the county where it is to be served. The officers of Sampson are not authorized to serve process issued to the officers of Duplin county: *Davis v. Sanderlin*, 119 N. C. 84. And if this summons was improperly issued and improperly served, it did not bring these defendants into court, and the justice of the peace had no jurisdiction over them and ⁴¹⁵ no right to go to judgment as against them: *Davis v. Sanderlin*, 119 N. C. 84.

Section 873 provides another mode of service by having the certificate of the clerk, and it also provides that the process shall be issued to the officers of the other county, where it is to be served. This goes to sustain the contention of the defendants.

While sections 871, 872, and 873 of the code provide that justices of the peace in certain cases may issue process to other counties than their own, yet section 874 positively forbids any justice from going to judgment against any nonresident defendant, unless it shall appear that process was served upon him at least ten days before the return day of the summons. In this case, it plainly appears that it had not been served ten days. The summons was issued on the 19th, returnable on the 24th, five days after it was issued, and it was served on the 23d, the day before the return day, when the justice proceeded to judgment. Such work as this, in defiance of the law, cannot be sustained. There is no error and the judgment of the court below is affirmed.

APPEAL—WHAT ORDERS ARE APPEALABLE.—Judgments or orders from which an appeal will lie are those which either terminate the action itself, or operate to divest some right in such a manner as to put it out of the power of the court making the order to put the parties in their original condition after the expiration of the term: Note to *Brown v. Cooper*, 60 Am. St. Rep. 199. See extended note to *Davie v. Davie*, 20 Am. St. Rep. 173, 174.

JURISDICTION—WHEN MAY BE QUESTIONED.—A want of jurisdiction, either of the person or subject matter, appearing on the face of the record, can be taken advantage of at any time, and in any court where the conclusiveness of the judgment or decree is the subject of judicial inquiry: Note to *Rogers v. Cady*, 48 Am. St. Rep. 105; *Higgins v. Bordages*, 88 Tex. 458; 53 Am. St. Rep. 770.

PROCESS—JURISDICTIONAL DEFECTS.—Jurisdictional defects in the service of process, and their effect, have been lately considered at length in this series in the monographic notes to *Choate v. Spencer*, 40 Am. St. Rep. 430-434, and *Sanford v. Edwards*, 61 Am. St. Rep. 485-496.

BEAR v. BOARD OF COUNTY COMMISSIONERS OF BRUNSWICK COUNTY.

[122 NORTH CAROLINA, 434.]

JUDGMENTS — CONCLUSIVENESS.—A judgment against parties present before a competent court is conclusive of matters adjudged therein.

JUDGMENTS.—IRREGULAR JUDGMENTS ARE VOIDABLE and may be set aside on motion.

JUDGMENTS, IF ERRONEOUS, may be remedied by appeal.

JUDGMENTS GENERALLY ARE CONCLUSIVE, except for fraud or mistake.

JUDGMENTS—CONCLUSIVENESS.—In a proceeding to compel the levy of taxes, to pay a judgment against commissioners of a county, it is no defense that such judgment was rendered on a void claim.

JUDGMENTS AGAINST CORPORATIONS—CONCLUSIVENESS.—A valid judgment against a corporation binds the stockholders in respect to corporate matters. Such judgment is not open to collateral attack.

JUDGMENTS AGAINST COUNTIES OR CITIZENS—CONCLUSIVENESS.—A judgment against a county or its legal representatives is a matter of general interest to all of its citizens, and is binding upon them, although they are not made parties thereto, unless it is impeached for fraud or mistake.

J. D. Bellamy and Shepherd & Busbee, for the appellant.

⁴³⁵ **FAIRCLOTH, C. J.** This action is brought to compel the defendant to levy a tax on all the subjects of taxation in the county, sufficient to pay the plaintiff's judgments set out in the complaint. The case agreed, upon the facts found by the court, states that the judgments sued on were obtained in 1894 in certain actions by the plaintiff against the defendant,

on former judgments obtained by the plaintiff against the defendant in the year 1888; that the causes of action on which the said judgments of 1888 were obtained were school claims as alleged in the answer; that there is nothing in the records or judgments of 1894 to show what the causes of action were, except that they were brought on former judgments. The present action was heard and tried at fall term, 1897, when the court denied the application for an order of mandamus and the plaintiff appealed. Upon the hearing, two citizen taxpayers of the county entered and denied the validity of the judgments of 1894, and also alleged that the taxpayers of the county were not bound and concluded by the judgment against the county board of commissioners, and this presents the question for this court.

Reason and a wise policy require that a judgment against parties present before a competent court should be conclusive of matters adjudged; otherwise, litigation might be endless. An irregular judgment is voidable and may be set aside on motion. An erroneous judgment is remedied by appeal. Generally, judgments are ⁴³⁶conclusive, *res judicata*, except for fraud or mistake.

The only contention here is, that it now appears that the former judgments were rendered on "school claims," which does not appear in the record in which the judgments of 1894 were entered. If there is any force in the contention, it should have been, and is presumed to have been, availed of when the former judgments were rendered. There seems to be no ground for the contention that the board of commissioners are not concluded. Are the taxpayers concluded by the action of their legal representative?

Where a valid judgment is rendered against a corporation, the stockholders are bound thereby in respect to corporate matters, and such judgment is not open to collateral attack: *Hawkins v. Glenn*, 131 U. S. 319. A judgment against a county or its legal representatives, in a matter of general interest to all its citizens, is binding upon the latter, though they are not parties to the suit. Every taxpayer is a real, though not a nominal, party to such judgment, and cannot relitigate any of the questions which were litigated in the original action against the county or its legal representatives, and, if the county board fail to avail itself of legal defenses, the people are concluded by the judgment. If such failure comes from negligence or corruption, the taxpayer has a remedy on both the criminal and civil dockets

of the courts, and, if from incompetency, the taxpayer's remedy is the ballot box. Such judgments must be conclusive unless impeached for fraud or mistake. They must be conclusive or not admissible at all. This doctrine is supported by able authorities: Freeman on Judgments, sec. 178; Black on Judgments, sec. 583; *State v. Rainey*, 74 Mo. 229; *Clark v. Wolf*, 29 Iowa, 197; *Harmon v. Auditor*, 123 Ill. 437 122; 5 Am. St. Rep. 502; *Cairo v. Campbell*, 116 Ill. 305. "A judgment against a city, county, or school district, in a matter of general interest, is binding upon all its citizens, though not made parties by name": 1 Herman on Res Judicata, secs. 155, 128; *Brownville v. Loague*, 129 U. S. 493, illustrates the distinction made in cases. It was there held that, if the petitioner for a writ of mandamus to levy a tax to pay his judgment is obliged to go behind the judgment in order to obtain his remedy, or if he must refer to the alleged cause of action on which his judgment was rendered, and if there appears on the face of the record that there was no cause of action, the principle of res judicata does not apply, and the aid of the court will not be granted.

The plaintiff is not embarrassed with such a condition. He relies upon a former judgment "filed and docketed." There was error below.

Reversed.

Douglas, J., dissents.

JUDGMENT—CONCLUSIVENESS.—A judgment of a court of competent jurisdiction is conclusive as against parties and privies on all questions adjudicated by it: *Barrick v. Horner*, 78 Md. 253; 44 Am. St. Rep. 283, and note. For discussions of the rule of res judicata, see *Fuller v. Metropolitan Life Ins. Co.*, 68 Conn. 55; 57 Am. St. Rep. 84, and note; *Martin v. Evans*, 85 Md. 8; 60 Am. St. Rep. 292, and note.

JUDGMENTS—IRREGULARITY AS GROUND OF RELIEF BY MOTION.—Irregularity is always a ground upon which a judgment may be attacked by motion to set it aside, and it has been said that a judgment is irregular whenever it is not entered in accordance with the practice and course of proceedings where it was rendered: See monographic note to *Morrill v. Morrill*, 23 Am. St. Rep. 106; also, monographic note to *Furman v. Furman*, 60 Am. St. Rep. 633-663, on the vacating of motions and decrees, when not specially authorized by statute.

JUDGMENTS AGAINST CORPORATIONS AS TO STOCKHOLDERS.—A stockholder is so far an integral part of the corporation that, in view of the law, he is privy to proceedings touching the body of which he is a member, and a judgment against it, establishing the existence and amount of its liabilities, is conclusive against him in proceedings to compel him to discharge his proportion thereof: *Mutual Fire Ins. Co. v. Phoenix Furniture Co.*, 108 Mich. 170; 62 Am. St. Rep. 693 and note; *Ball v. Reese*, 58 Kan. 614; 62 Am. St. Rep. 638, and note.

JUDGMENTS AGAINST COUNTIES—WHEN BINDING UPON CITIZENS.—A judgment against a county upon a matter of general interest to all its citizens is binding on the latter, though they are not real parties thereto. Every taxpayer is a real, though not a nominal, party to such judgment: *Harmon v. Auditor*, 123 Ill. 122-5 Am. St. Rep. 502. If, for the purpose of providing for its payment, the officers of the county levy a tax and endeavor to collect it, none of the citizens, in resisting payment thereof, can dispute the validity of the judgment, nor relitigate questions which were, or could have been, decided thereby: *Extended note to People v. Holladay*, 27 Am. St. Rep. 196.

CARTER v. SLOCOMB.

[122 NORTH CAROLINA, 475.]

MORTGAGES—POWER OF SALE—EXERCISE OF AFTER DEATH OF MORTGAGOR.—A sale of land by a mortgagee, made after the death of the mortgagor, under a power given by the mortgage, though without notice to the heir, is valid.

MORTGAGES—POWER OF SALE—DEATH OF MORTGAGOR.—A power of sale contained in a mortgage does not cease nor become inefficacious upon the death of the mortgagor.

POWER COUPLED WITH AN INTEREST.—If a power is coupled with an interest, it survives the person giving it, and may be executed after his death.

J. C. and S. H. MacRae, for the appellants.

H. McD. Robinson, for the appellee

⁴⁷⁶ FAIRCLOTH, C. J. The sole question presented is, whether a sale of land by a mortgagee under a power of sale in the mortgage, made after the death of the mortgagor, without notice to the heir, conveys a good title—that is, whether at the death of the mortgagor the power of sale ceases and becomes inefficacious.

In this state, when a mortgage is executed the mortgagee becomes the legal, and the mortgagor the equitable owner, and until the day of redemption is past the mortgagor has a legal right; and afterward an equity of redemption: *Hemphill v. Ross*, 66 N. C. 477.

⁴⁷⁷ No question of fraud enters into the controversy, nor any as to the amount due on the mortgage debt. The mortgagor cannot demand any notice of intention to sell under the power, and the heir at law stands in the place of his ancestor: *Carver v. Brady*, 104 N. C. 219; *Frazier v. Bean*, 96 N. C. 327. The general rule is, that a power ceases with the life of the person giving it, but where the power is coupled with an interest, it survives the life of the person giving it, and may be executed after his death. By a “power coupled with an interest” is meant

an interest in the thing itself, that is to say, the power must be ingrafted on the estate in the thing, and not on the product of the exercise of the power: *Hunt v. Rousmainer*, 8 Wheat. 203. This principle is not affected by any change of circumstances, such as the death of the mortgagor: 8 Am. & Eng. Ency. of Law, 872; *Cranston v. Crane*, 97 Mass. 459; 93 Am. Dec. 106. "The death of the mortgagor does not revoke a power of sale": 2 Jones on Mortgages, sec. 1792, and cases cited. "In those states where the common-law rule prevails that such a power is coupled with an interest, the death or bankruptcy of the mortgagor does not revoke or suspend the power of the legal holder to sell under the power, as the power is coupled with an irrevocable interest and cannot be revoked, but in those states where this power is not coupled with an interest, the rule is different": 2 Pingree on Mortgages, sec. 1336.

The principle here announced is fully recognized in *Parker v. Beasley*, 116 N. C. 1, and other cases by this court.

Upon these authorities we find that there was error in the judgment below.

Error; reversed.

POWERS—SURVIVABILITY—POWER OF SALE IN MORTGAGE.—A power coupled with an interest is not terminated by the death of the donor: *Note to Farmers' Loan and Trust Co. v. Wilson*, 36 Am. St. Rep. 700. A power of sale in a mortgage conferred on the mortgagee is a power coupled with an interest, and passes to the executors, administrators, and assigns, and is not lost by the death or insanity of the mortgagor: *Barrick v. Horner*, 78 Md. 253; 44 Am. St. Rep. 283, and note; *Beatie v. Butler*, 21 Mo. 313; 64 Am. Dec. 234, and note. See *Doolittle v. Lewis*, 7 Johns. Ch. 45; 11 Am. Dec. 389. The contrary is held in South Carolina, because in that state a mortgagor retains the legal title, and the mortgagee, therefore, has not a power coupled with an interest: *Johnson v. Johnson*, 27 S. C. 309; 13 Am. St. Rep. 636.

MARSH v. NIMOCKS.

[122 NORTH CAROLINA, 478.]

JUDICIAL SALES—JURISDICTION.—In a proceeding to sell land for assets under order of court, the court has all the power necessary to accomplish its purpose; and, when relief can be given in the pending action, it must be done by motion in the cause, and not by an independent action.

JUDICIAL SALE—ACTION AGAINST DEFAULTING BIDDER.—An independent action cannot be maintained against a defaulting bidder at a judicial sale to recover the amount of his bid, nor against one who has raised such bid at a sale for deficiency between the original bid and the bid approved on a resale, unless

final judgment has been rendered in the action in which the sale was made. The remedy is by motion in the original action.

JUDICIAL SALES—RESALE—PRACTICE.—If a judicial sale has been set aside and a resale ordered on an advanced bid, the resale should be started on such bid; and, in default of other bidders, the party making such advanced bid should be declared the purchaser. Upon the failure of such bidder to comply with his purchase, a motion should be made in that action for him to show cause why judgment should not be rendered against him.

G. M. Rose, H. L. Cook, and N. A. Sinclair, for the appellant.

H. McD. Robinson, for the appellee.

⁴⁷⁰ **FAIRCLOTH, C. J.** The plaintiff, under an order of court, sold several lots of land, for assets, to several parties, and reported the sale. The defendants, in apt time, offered to raise the bid ten per cent on certain lots and eleven per cent on other lots. The clerk ordered the lots to be resold, except the Magnolia building, at which the defendants failed to attend, and the lots were sold to other persons, and the sale was confirmed. The difference between the price bid at the second sale and the price at the first sale, plus the increased bid offered by the defendants, was one hundred and eighty-six dollars and sixty-five cents, and to recover this difference this action was instituted.

The action must be dismissed. In a proceeding to sell land for assets, the court of equity has all the powers necessary to accomplish its purpose, and, when relief can be given in the pending action, it must be done by a motion in the cause and not by an independent action. The latter is allowed only where the matter has been closed by a final judgment. If the purchaser fails to comply with his bid, the remedy is by motion in the cause to show cause, et cetera, and if this mode be not pursued, and a new action is brought, the court *ex mero motu* will dismiss it. The course is adopted to avoid the multiplicity of suits, avoid delay, and save costs: *Hudson v. Coble*, 97 N. C. 260; *Ex parte Petillo*, 80 N. C. 50; *Mason v. Miles*, 63 N. C. 564, and numerous cases cited in them.

The offer, then, was a standing bid at the second sale. We have adopted the English rule of practice in such matters. At the second sale, the plaintiff should have started the bidding at the amount of the price bid at the first sale with the percentage offered by the defendants added, and if no other bid was made, he should have declared the defendants as the best bidders and purchasers, ⁴⁸⁰ subject to confirmation, and made his report to the court accordingly.

On failure of the defendants to comply with such bid, the

practice is by motion in the pending action, upon notice to the defendants to show cause why judgment should not be entered as the court may deem proper, when the defendants have an opportunity to excuse their noncompliance, if they are able to do so: *Pritchard v. Askew*, 80 N. C. 86; *Attorney General v. Roanoke Co.*, 86 N. C. 408. Many of the decisions regulating judicial sales will be found collected in *Trull v. Rice*, 92 N. C. 572; *Vaughan v. Gooch*, 92 N. C. 524.

Action dismissed.

JUDICIAL SALES—RESALE UPON FAILURE TO COMPLETE PURCHASE.—The purchaser at a sheriff's sale must pay his bid at once, or it may be disregarded and the property resold: *Durnford v. Degruys*, 8 Mart. (La.) 220; 13 Am. Dec. 285. If the property at resale brings less than the amount bid at the first sale, the difference between these amounts may be recovered from the defaulting bidder: See monographic note to *Mount v. Brown*, 69 Am. Dec. 366. In some states statutes allow the sheriff to resell the property when the purchaser refuses to comply with his bid, and on motion to have judgment against him for the deficiency: Note to *Mount v. Brown*, 69 Am. Dec. 367. See *Stout v. Philippi Mfg. etc. Co.*, 41 W. Va. 339; 56 Am. St. Rep. 843.

HORTON v. HOME INSURANCE COMPANY.

[122 NORTH CAROLINA, 403.]

INSURANCE—FIRE—CONDITIONS—WAIVER.—Under conditions in a policy of life insurance providing that it should be void if, with the knowledge of the insured, foreclosure proceedings be commenced or notice given of sale of any property covered by the policy by virtue of any mortgage or trust deed, and also that if the policy should be canceled or become void the unearned portion of the premium paid should be returned, the insurer is liable for a loss, although the property insured is advertised for sale under a trust deed before the fire and loss, provided the insured has no notice or knowledge of such advertised sale, except such as is obtained from reading the advertisement before the fire, which advertisement the agent of the insurer has also seen, and the policy has not been canceled nor any part of the unearned premium returned to the insured prior to the fire.

AGENCY.—KNOWLEDGE OF A LOCAL INSURANCE AGENT is the knowledge of the insurance company employing him.

INSURANCE—CONDITIONS—WAIVER BY AGENT.—Conditions in a policy of insurance working a forfeiture are matters of contract and not of limitation, and may be waived by the insurer. Such waiver may be presumed from the acts of the local agent.

INSURANCE—WAIVER OF CONDITIONS.—If an insurer, knowing the facts, does that which is inconsistent with an intention to insist upon a strict compliance with the conditions precedent of the contract of insurance, he must be treated as having waived their performance, and the insured may recover without proving performance, even though the policy provides that none of its conditions shall be waived except by written agreement.

INSURANCE—WAIVER OF CONDITIONS.—The violations of any of the conditions in a policy of insurance may be waived by the insurer, and a waiver may be implied from the acts and conduct of the insurer after knowledge that such conditions have been broken.

INSURANCE—WAIVER OF CONDITIONS.—If an insurer, with knowledge that conditions have been broken, giving him the right to cancel a policy of insurance, fails to notify the insured within a reasonable time of his intention to cancel the policy, and fails to return the unearned premium as required by the policy, this must be taken as evidence showing a waiver of the breach of such conditions.

INSURANCE—CONSTRUCTION OF CONTRACT.—The statute of North Carolina provides that "all contracts of insurance, the application for which is taken within the state, shall be deemed to have been made within the state, and subject to the laws thereof." Hence a policy of insurance issued by a foreign company upon an application made in that state is governed by such statute, no matter what the form of the contract may be.

R. T. Bennett, for the plaintiffs and appellants.

J. A. Lockwood, for the defendant and appellant.

⁵⁰⁰ DOUGLAS, J. This is an action brought on a policy of insurance to recover three-fourths of the value of a house destroyed by fire. The property belonged to the plaintiff, and was conveyed by deed of trust to certain trustees to secure a bond given to the Life Insurance Company of Virginia. The policy was on its face made payable to the Life Insurance Company of Virginia, mortgagee, and provided that it should be void on several contingencies, among others: "If, with the knowledge of the insured, foreclosure proceedings be commenced or notice given of sale of any property covered by this policy by virtue of any mortgage or trust deed." It also provided that: "This policy shall be canceled at any time at request of insured, or by the company, by giving five days' notice of such cancellation If this policy shall be canceled, or become void, or cease, the premium having been actually paid, the unearned portion shall be returned on surrender of this policy or last renewal—this company retaining the customary short rate, except that when this policy is canceled by this company by giving notice, it shall retain only the pro rata premium." On July 5, 1894, the trustees advertised the property for sale, in a weekly newspaper published in the town of Wadesboro, under the deed of trust, and on August 7, 1894, before any sale, the property insured was totally destroyed by fire. No notice of this sale was given by the trustees to the insured or her husband, and they had no knowledge or information that the property would be

advertised for sale before they saw the advertisement in the newspaper some time before the fire. The resident agent of ⁵⁰¹ the defendant company testified that he issued the policy, was a regular subscriber of the said paper, and saw the advertisement while it was running through the paper before the fire. No part of the unearned premium was ever repaid or tendered to the insured. It was admitted that the insured had in due time given the notice and sent on proofs of loss according to the provisions contained in the policy.

The following issues were submitted to the jury: 1. Did Plaintiff Martha C. Horton have knowledge of the notice of sale under the deed of trust of the property insured, and if so, when was such knowledge acquired. A. Yes; after the publication of the notice by the trustees, and before the fire, which occurred while said notice was being published. 2. Did W. A. Rose, local agent of the Home Insurance Company, have knowledge of said notice of sale, and, if so, when was such knowledge acquired. A. Yes; after said publication of notice and before the fire. 3. Did defendant Home Insurance Company waive the breach, if any, by the plaintiffs of the conditions of the policy? A. No. 4. What was the cash value of the plaintiffs' house at the time of its destruction? A. Two thousand two hundred and fifty dollars. 5. In what sum, if any, is defendant Home Insurance Company indebted to plaintiff, Martha C. Horton, on her policy of insurance? A. Sixteen hundred and eighty-seven dollars and fifty cents.

The first and second issues were answered by consent; the third was answered under the instruction of the court that there was no evidence of waiver; and the fifth issue was answered by the court as a consequence of the fourth, upon an agreement that the defendant, if liable at all, was indebted to the feme plaintiff to the amount ⁵⁰² of three-fourths of the value of the property as found by the jury.

After the finding upon the fourth issue, the defendant contended that the court should answer the fifth issue "nothing," and moved for judgment on the first and third issues and responses thereto; the contention of the defendant being that its liability upon the policy had ceased before the fire, by reason of the stipulation which provides that the entire policy, unless provided by agreement entered thereon or added thereto, shall be void if, with the knowledge of the insured, foreclosure proceedings be commenced or notice given of sale of any property covered by this policy by virtue of any mortgage or trust deed.

The court refused this motion, and gave judgment for the plaintiff; whereupon the defendant appealed. This brings before us a pure question of law, founded upon the charge of the court, in which we see no error. Admitting the validity of a provision rendering the policy void upon a contingency beyond the control of the assured, the only reasonable construction we can give to it is, that it was intended to compel the assured to give notice to the company of any such proceedings or advertisement so that the company could exercise its right to declare the policy void, and return the unearned premium, which it was required to do by the very terms of the policy. But the assured could not be required to give information which she did not possess, and which came to her only in the same manner and through the same means that it came to the agent of the defendant, whose knowledge is in law that of the defendant. It is probable that, as the agent lived in the same town where the newspaper was published, he saw the advertisement before the plaintiff, who lived in a different town.

⁵⁰³ In any event she has violated no provision of the contract of insurance, either in letter or in substance, as the notice of sale was given without her knowledge. If the defendant stands upon the letter of the contract, ignoring the equities of the plaintiff, he must be satisfied with what is given him by a literal interpretation. If he demands his full pound of flesh, he must take that and nothing more.

We are of the opinion that the judgment is correct upon the issues as found by the jury, even in the absence of a waiver. If, under proper instructions from his honor, the jury had found that there was a waiver, as they might well have done from the evidence, the case would be that much stronger for the plaintiff; but, as the error of the court consisted in directing a verdict upon that issue instead of leaving it to the jury, we cannot assume to say what their verdict would have been.

The correctness of this instruction is not strictly presented in this appeal; but, as the plaintiff has directly raised the question in his own appeal now before us, and which must be disposed of in some way, we will consider the two appeals together, so as to avoid repetition of the same citations. Of course, the plaintiff's appeal was taken simply to secure her exceptions in the event of an adverse decision upon the points involved herein. It is rendered useless to her by our view of the case, as its successful prosecution could result only in a new trial, which is now neither necessary nor desirable. At the same time, as it

raises a question of importance, we think it better to reaffirm the repeated decisions of this court. The court below erred in directing a verdict upon that issue, as there was sufficient evidence to go to the jury. It is well settled in this state that the knowledge of the local agent of an insurance company ⁵⁰⁴ is, in law, the knowledge of the principal; that the conditions in a policy working a forfeiture are matters of contract and not of limitation, and may be waived by the insurer, and that such waiver may be presumed from the acts of the agent: *Argall v. Old North State Ins. Co.*, 84 N. C. 355; *Dibbrell v. Georgia etc. Ins. Co.*, 110 N. C. 193; 28 Am. St. Rep. 678; *Follette v. Mutual Accident Assn.* 110 N. C. 377; 28 Am. St. Rep. 693; *Follette v. United States etc. Assn.*, 107 N. C. 240; 22 Am. St. Rep. 878; *Grubbs v. North Carolina etc. Ins. Co.*, 108 N. C. 472; 23 Am. St. Rep. 62; *Bergeron v. Pamlico Ins. etc. Co.*, 11 N. C. 45. These cases cite numerous authorities which it is unnecessary here to repeat. One further citation will suffice: *Wood on Insurance*, 496, cited and approved in *Collins v. Farmville etc. Ins. Co.*, 79 N. C. 279, at page 284, 28 Am. Rep. 322, says: "When the insurer, knowing the facts, does that which is inconsistent with its intention to insist upon a strict compliance with the conditions precedent of the contract, it is treated as having waived their performance, and the assured may recover without proving performance; and that, too, even though the policy provides that none of its conditions shall be waived except by written agreement. . . . And such waiver may be implied from what is said or done by the insurer. So, the breach of any condition in the policy, as against an increase of risk or the keeping of certain hazardous goods . . . or, indeed, the violation of any of the conditions of the policy, may be waived by the insurer, and a waiver may be implied from the acts and conduct of the insurer after knowledge that such conditions have been broken." So, again, in section 497: "When other insurance is required to be indorsed upon the policy, if notice thereof is given to the insurer or his agent and consent is not indorsed nor the policy canceled, further compliance is treated as waived, and the ⁵⁰⁵ insurer is estopped from setting up such other insurance to defeat its liability upon the policy."

This line of cases should be distinguished from *Alspaugh v. British-American Ins. Co.*, 121 N. C. 290, where the court based its judgment expressly upon the ground that the condition whose violation was held to vitiate the policy was not a mere technicality but of the very essence of the contract, and under

the circumstances, could not be held to be waived. There, the condition was that the mill should not run later than ten o'clock at night, and, by agreeing to this condition, the insured obtained his insurance for three per cent, when he would otherwise have been compelled to pay five and one-half per cent, thus saving nearly half the premium. It would not have been just for the insured to take advantage of the condition, and yet not be bound by it. In the case at bar, it would be equally unfair for the defendant to keep the entire premium, and yet cancel the policy in violation of its express terms. When the property was advertised for sale, no loss had occurred, and there was apparently no reason to anticipate a loss. Upon being informed of the notice, the defendant should, within a reasonable time, have notified the insured of its determination to cancel the policy, and have returned the unearned premium. Its failure to do so was evidence tending to show a waiver.

The powers of a local insurance agent and the relative liabilities of the company are ably discussed and clearly defined by Justice Miller in *Insurance Co. v. Wilkinson*, 13 Wall. 222, in which he says: "The powers of the agent are *prima facie* co-extensive with the business intrusted to his care, and will not be narrowed by limitations not communicated to the person with whom he deals [citing authorities]. An insurance ~~506~~ company establishing a local agency must be held responsible to the parties with whom they transact business for the acts and declarations of the agent, within the scope of his employment, as if they proceeded from the principal." The vigorous language in the earlier part of the opinion, in which he condemns the conduct of some insurance companies in stimulating their agents to the highest degree of activity in soliciting insurance, and then seeking to avoid responsibility for their acts and representations, is worthy of note as coming from so high a source.

In *Willis v. Germania Ins. Co.*, 79 N. C. 285, at page 289, Justice Reade, whose clear and incisive opinions have the ring of a bell and the edge of a razor, says: "Insurance contracts are prepared by insurers who have at their command in their preparation the best legal talent and business capacity, and every precaution is taken for their protection. This is made necessary to prevent the frauds of bad men. But, on the other hand, the insured are generally plain men, without counsel or the capacity to understand the involved and complicated writings which they are required to sign, and which in most cases proba-

bly they never read. What they understand is, that they are to pay the insurer so much money, and, if they are burnt out, the insurer pays them so much. When, therefore, there has been good faith on the part of the insured, and a substantive compliance with the contract on their part, the courts will require nothing more."

The counsel for the defendant called the attention of the court to section 6 of chapter 299 of the laws of 1893, wherein it is provided that "the standard fire insurance policy, as prescribed and set out in section 121 of the insurance law of New York, shall be exclusively used ⁵⁰⁷ in this state by all fire insurance companies from and after the first day of May, 1893," and insisted that such a policy should be construed in accordance with the decisions of the state from which it came. Whatever force there might otherwise be in the suggestion is fully met by section 8 of the same act, which reads as follows: "All contracts of insurance, the application for which is taken within this state, shall be deemed to have been made within this state, and subject to the laws thereof." In the determination of a new question, the decisions of other states may be taken as precedents to guide our action, but can never be authorities to reverse the settled ruling of our courts. These two sections are not inconsistent, and, when construed together, become clear in their meaning. The policy is essentially a North Carolina contract, although the form thereof may have been borrowed from another jurisdiction. A suit of homespun is none the less a native production because the pattern by which it was cut came from another state. It was deemed best to have a uniform policy, which would eventually become familiar to our people, and by repeated adjudications acquire a settled meaning. The New York form was selected because it had been adopted by the largest insurance state in the country, and was the outgrowth of many years of careful and efficient state supervision. It is none the less a North Carolina contract, solvable under our laws and determinable by our decisions.

The judgment below is affirmed.

PLAINTIFF'S APPEAL.

DOUGLAS, J. This is the plaintiff's appeal in the same case that has just been decided on the defendant's ³⁵³ appeal, wherein the judgment of the court below was affirmed. In that opinion we have fully discussed the questions raised on both appeals, and it is, therefore, unnecessary to repeat here either the

facts or arguments. The judgment below is affirmed, but as the plaintiff prosecuted this appeal in good faith to protect what might have become a substantial right, and as his exception to the ruling of the court below is sustained, he is entitled to his costs.

Judgment is affirmed.

INSURANCE—CONDITION AGAINST ALIENATION.—Under a policy of insurance containing a clause avoiding the insurance "if, within the knowledge of the assured, foreclosure proceedings be commenced or notice given of the sale of any property covered by the policy, by authority of any mortgage or trust deed," it is not necessary that the sale should be confirmed or otherwise made final, nor indeed that any sale should be effected. It is sufficient that notice of the sale has been given or foreclosure proceedings otherwise commenced: *Note to Hanover Fire Ins. Co. v. Brown*, 39 Am. St. Rep. 395. See *Wood v. American Fire Ins. Co.*, 149 N. Y. 382; 52 Am. St. Rep. 733, and note.

INSURANCE—WAIVER OF CONDITIONS OF FORFEITURE. A forfeiture in a policy of insurance is waived where the insurer, being fully cognizant of the facts out of which a forfeiture is claimed, treats, and continues to treat, the contract as binding, and induces the insured to act in that belief: *Hanover Fire Ins. Co. v. Bohn*, 48 Neb. 743; 58 Am. St. Rep. 719, and note; *Manchester Fire Assur. Co. v. Glenn*, 13 Ind. App. 365; 55 Am. St. Rep. 225, and note; *Enos v. St. Paul etc. Ins. Co.*, 4 S. Dak. 639; 46 Am. St. Rep. 796, and note. Any course of action on the part of an insurer which leads an insured honestly to believe that, by conformity thereto, a forfeiture of his policy will not be incurred, followed by due conformity on his part, estops the insurer from insisting upon a forfeiture: *Agricultural Ins. Co. v. Potts*, 55 N. J. L. 158; 39 Am. St. Rep. 637, and note.

INSURANCE—FORFEITURE—KNOWLEDGE OF AGENT.—Notice to an agent of facts material to the risk is notice to the insurer: *Lumbermen's Mut. Ins. Co. v. Bell*, 166 Ill. 400; 57 Am. St. Rep. 140, and note. So notice to an agent of facts avoiding a policy may, if not taken advantage of and acted upon, raise a waiver on the part of the company to insist upon the conditions of forfeiture violated: *Kahn v. Traders' Ins. Co.*, 4 Wyo. 419; 62 Am. St. Rep. 47, and note; *Hartford Fire Ins. Co. v. Keating*, 86 Md. 130; 63 Am. St. Rep. 499, and note; note to *Taylor v. State Ins. Co.*, 60 Am. St. Rep. 215. An insurance company is estopped from asserting the invalidity of its policy at the time it was issued, for the violation of any of its conditions, if the agent issuing it had knowledge of such violation: *Mesterman v. Home Mut. Ins. Co.*, 5 Wash. 524; 34 Am. St. Rep. 877, and note.

BERNHARDT v. BROWN.

[122 NORTH CAROLINA, 587.]

ESTOPPEL TO ASSERT SUPERIOR TITLE.—If parties claim title from a common source, and the assertion of such title by the defendant is adjudged invalid, he is estopped, in a subsequent action involving the title to the same land, to assert a superior title in some one else with whom he does not connect himself.

EJECTMENT—BURDEN OF PROOF.—If the land in dispute in ejectment is within the boundary of plaintiff's deed, and the defendant claims under exceptions to such deed, the burden of proof is upon him to bring himself within such exceptions.

EJECTMENT—PAYMENT OF TAXES AS EVIDENCE OF TITLE.—In an action of ejectment, mere evidence of the payment of taxes is not proof of title in the payor, when he has not connected himself with any outstanding title, or shown adverse possession for the time required.

EJECTMENT—EVIDENCE OF ADVERSE POSSESSION for a period less than prescribed time is not a circumstance to go to the jury as tending to show title in an action of ejectment.

FRAUDULENT CONVEYANCES.—A DEED ABSOLUTE ON ITS FACE, but intended as mere security for a debt, is fraudulent and void as against the creditors of the grantor.

FRAUDULENT CONVEYANCES—EVIDENCE.—If a deed absolute on its face is claimed to be fraudulent as being intended merely as security for a debt of the grantor, an unrecorded deed of defeasance to the land and bonds secured thereby are competent as evidence tending to show the nature of the transaction, without proof of their execution.

DEEDS OF CORPORATION—DEFECTIVE ACKNOWLEDGMENT.—An acknowledgment of the deed of a corporation made by individuals instead of by its officers is fatally defective and its registration is void. A subsequent reacknowledgment and reregistration of the deed, after the accrual of another title and after action brought to maintain such title, can have no effect.

EXECUTIONS — COLLATERAL ATTACK. — Proceedings under a voidable execution cannot be collaterally attacked.

JUDGMENTS.—DOCKETING of a judgment is not an essential condition of its efficacy, except for the purposes of a lien, and is not a condition precedent to issuing execution thereon to an officer where it is rendered or to an officer in any other county.

EXECUTION SALES—DOCKETING JUDGMENT.—Sale under an execution levied on realty carries a good title, though the judgment under which the execution issues is not docketed, or the lien of the docketing has expired.

EXECUTIONS — DIRECTORY STATUTE. — A statutory requirement that the date of the docketing of judgment shall be stated in the execution issued thereon, is directory merely.

EXECUTIONS—CLERICAL ERRORS contained in an execution which do not invalidate any other part of it cannot be complained of by strangers to it.

J. S. Ervin, and Avery & Avery, for the appellants.

J. T. Perkins and E. Jones, for the appellee.

CLARK, J. Upon the complaint and answer it appears that both sides claim under the "North Carolina Estate Company, Limited." The eighth prayer for instruction by the defendants is, that ordinarily, when it is shown that both parties hold through a title from a common source, it is not necessary to go beyond the common title, unless a superior title be shown by one of the parties with which he connects himself by a chain of title, but in this case the title of the defendants derived from the common source having been adjudged void (upon the former appeal in this case), the defendants are not estopped from showing a better outstanding title in any person other than the common source of title. There is not a scintilla of evidence connecting the defendants with any outstanding title; and upon their pleadings they are estopped to deny the common source of title. The fact that their assertion of having that title in themselves has been adjudged invalid in this action does not set them free now to assert a superior title in some one else with whom they do not connect themselves. But, if it did, it would not avail the defendants, as the holders of the alleged outstanding title of a past interest, if such were shown, would be merely tenants ⁵⁹⁰ in common with the plaintiffs, who can, therefore, recover as against these defendants: *Moody v. Johnson*, 112 N. C. 804; *Gilchrist v. Middleton*, 107 N. C. 663. Therefore, it is unnecessary to consider any of the exceptions in this case as to matters prior to the common source of title. The title was shown to be out of the state.

The defendants except because "five thousand acres being excepted from the grant of 1795 under which the plaintiffs claim, the burden is on the plaintiffs to show that the land sued for is not the excepted part." The law is well settled otherwise. "The locus in quo being within the boundary of plaintiff's deed, and defendant claiming under exceptions in said deed, it is clear that it is incumbent on him to bring himself within the exceptions by proof": *Roan Mountain etc. Co. v. Edwards*, 110 N. C. 353; *Gudger v. Hensley*, 82 N. C. 481. Besides, the complaint is to recover "the lands remaining unsold and not excepted from the boundaries of the grant," and the answer says the defendants "are in possession of the land sued for and in controversy."

Payment of taxes is some evidence of title (*Austin v. King*, 97 N. C. 339; *Ruffin v. Overby*, 105 N. C. 78) but, if it was offered to be shown here by competent proof, its exclusion was harmless error, for it having already been adjudged in this case (*Bernhardt v. Brown*, 118 N. C. 700) that the defendants

did not have the title of the "North Carolina Estate Company, Limited," which they set up in their answer, and not having connected themselves with any outstanding title nor shown possession for seven years under color of title, proof of payment of taxes for two or three years before action brought could have availed them nothing. Even evidence of adverse possession for a period less than the prescribed time is ⁵⁹¹ not a circumstance to go to the jury: *King v. Wells*, 94 N. C. 344; *Melvin v. Waddell*, 75 N. C. 361.

The jury found, on competent evidence and proper instruction, that the conveyance to Hatterby and Clarkson, though absolute on its face, was a mere security for debt. It was therefore void as to the creditors of the North Carolina Estate Company, Limited, and to the plaintiffs who hold under a judgment and execution sale in favor of one of such creditors: *Gregory v. Perkins*, 15 N. C. 50; *Gulley v. Macy*, 84 N. C. 434. The unregistered deed of defeasance and bonds secured thereby produced by the defendants in response to an order of the court (under the code, sections 587 and 1373) were competent to submit to the jury as evidence tending to show the nature of the transaction, without proof of their execution. Being in possession of the defendants, and the facts peculiarly within their knowledge, it devolved upon them to negative any inference arising from the existence of such papers. But this conveyance, even if it was an absolute deed, was not proved by the officers of the corporation but by the individual acknowledgment of Matthew Robins and Walter Mullens and the probate was fatally defective: *Clark v. Hodge*, 116 N. C. 761; *Plemmons v. Southern Improvement Co.*, 108 N. C. 614; *Duke v. Markham*, 105 N. C. 131; 18 Am. St. Rep. 889; *Bason v. Kings Mountain Min. Co.*, 90 N. C. 417. Its registration was therefore a nullity: *Quinnerly v. Quinnerly*, 114 N. C. 145; *Long v. Crews*, 113 N. C. 256; *Duke v. Markham*, 105 N. C. 131; 18 Am. St. Rep. 889; *Todd v. Outlaw*, 79 N. C. 235; *DeCourcy v. Barr*, 45 N. C. 181. The subsequent reprobate and reregistration in 1897, since the plaintiff's title accrued and since this action was brought, can have no effect: Acts 1885, c. 147; *Waters v. Crabtree*, 105 N. C. 394.

⁵⁹² This brings us to the point most earnestly debated in this case, i. e., whether the plaintiffs have acquired the title of the North Carolina Estate Company, Limited, under the execution sale. At January term, 1890, of Catawba superior court, John Paalzo obtained judgment against the North Carolina Estate

Company, Limited. On March 8, 1890, a transcript of the judgment was sent to the superior court of Burke county and was entered on the docket there, on March 10, 1890. An execution on this judgment, under seal of the court, which states on its face that it was issued from Catawba, on March 8, 1890, was sent to the sheriff of Burke county, who indorsed thereon its receipt by him, May 31st, and after due advertisement the land in question, the property of the defendant in the execution, was sold on the 8th of July of the same year, at which sale the plaintiff in the execution bought, and received the sheriff's deed for the land, and in 1892 duly conveyed the same to the plaintiffs in this action. The defendants contend that said sale was void because on March 8, 1890, when the execution purports to have been issued to the sheriff of Burke county, the transcript of the judgment had not then been docketed in the latter county. From the official entries it appears, therefore, that the execution and transcript of judgment were sent to Burke county on the same day, the latter being docketed on the 10th of March, and the former indorsed by the sheriff, "Received May 31," and the advertisement and sale were long after the judgment had been docketed, but the defendants contend that the sale thereunder was void unless the judgment had already been docketed in Burke county when the execution issued, on the ground that this is a prerequisite under the words of the code, section ⁵⁹³ 443 and 444, that execution "may be issued to any county where the judgment is docketed," and because section 448 provides that the execution must state, inter alia, "the time of docketing in the county to which the execution is issued." The defendants' counsel contend that such docketing is a condition precedent, and that an execution issued before the condition is complied with is absolutely void. The customary practice in this state has been that which seems to have been pursued in this case, i. e., to send to the other county at the same time the transcript of the judgment for docketing and the execution. It has not been usual to require a certificate of the docketing in another county before issuing execution to the sheriff thereof. If such practice rendered this execution absolutely void, a great many titles are worthless. Even if it is voidable, it would not avail the defendants who could not attack such proceedings collaterally, unless they are void: *Bernhardt v. Brown*, 118 N. C. 700. The very able brief of the defendants' counsel concedes that the code, sections 433-436, inclusive, require docketing "in order to secure a lien for that

purpose alone." This is also apparent from chapter 439 of the acts of 1889: *Alsop v. Moseley*, 104 N. C. 60. But they insist it is otherwise as to sections 443, 444, and 448, above quoted. The last three sections, however, on their face apply to executions issued to the county in which the judgment is rendered fully as much as to those issued to any other county, and it has been repeatedly held that a sale under an execution levied on realty carries a good title though the judgment was not docketed or the lien of the docketing has expired: *Sawyers v. Sawyers*, 93 N. C. 321, 324; *Spicer v. Gambill*, 93 N. C. 378; *Coates v. Wilkes*, ⁵⁹⁴ 94 N. C. 174, 181. In *Lytle v. Lytle*, 94 N. C. 683, the very point here presented is passed upon. "The docketing of a judgment is not an essential condition of its efficacy, nor a precedent requisite to an enforcement by final process. It is necessary to create and prolong the lien thus acquired, for the benefit of the creditor against subsequent liens, encumbrances, and conveyances of the same property." In that case execution issued to Buncombe county upon a judgment rendered in McDowell, without docketing the judgment in Buncombe at all. In *Holman v. Miller*, 103 N. C. 118, it is said: "Under the present system, no lien is acquired upon land in the absence of an execution and levy, until the judgment has been docketed."

Our conclusion upon the authorities is, that docketing is only for the purpose of giving a lien, and is not a condition precedent to issuing an execution. If there is a docketed judgment in force at the sale of realty under execution, the sale relates the title back to the date of such docketing. If no docketed judgment is in force under which the execution is issued, the title as against the defendant relates back to the levy, but is subject to docketed judgments in favor of the plaintiffs in force at the date of the sale: *Pipkin v. Adams*, 114 N. C. 201; Code, sec. 435.

The requirement in section 448 that the date of the docketing should be stated in the execution is like the requirement to test the execution of the preceding term which is held directory: *Bryan v. Hubbs*, 69 N. C. 423; *Williams v. Weaver*, 94 N. C. 134.

The recital in an additional paragraph in the execution issued to Burke county of a levy on certain uncut walnut timber in Catawba county, and the order to the sheriff of Burke county to sell it, though the attachment ⁵⁹⁵ on the timber had been vacated, was a pure clerical error, which did not invalidate the other part of the execution, and of which certainly the defend-

ants in this action, who were strangers to the execution, cannot complain.

Affirmed.

ESTOPPEL—OUTSTANDING TITLE—CLAIMANTS OF TITLE FROM COMMON SOURCE.—Where both parties claim title to land from a common source, the defendant is estopped from setting up an outstanding title with which he is disconnected: *Doyle v. Wade*, 23 Fla. 90; 11 Am. St. Rep. 334. See monographic note to *Rice v. St. Louis etc. Ry. Co.*, 47 Am. St. Rep. 75-79, on claimants under a common source of title; also, to *Gilliam v. Bird*, 49 Am. Dec. 383-389.

EJECTMENT—PAYMENT OF TAXES AS EVIDENCE OF TITLE.—Payment of taxes on land is not an act of possession nor is it evidence of a possessory title: *Tillotson v. Prichard*, 60 Vt. 94; 6 Am. St. Rep. 95, and note; but tax receipts, showing payment of taxes by one in possession, are admissible in evidence for him as tending to show both a claim of ownership and the extent of the claimant's possession: *Green v. Jordan*, 83 Ala. 220; 8 Am. St. Rep. 711.

EJECTMENT — ADVERSE POSSESSION — EVIDENCE OF.—Ejectment will not lie against one who has full and undisturbed possession during the statutory period, and it is immaterial by what means he came into possession, whether with or without title, by right or by wrong: *Den v. Wright*, 7 N. J. L. 175; 11 Am. Dec. 546. See *Patten v. Scott*, 118 Pa. St. 115; 4 Am. St. Rep. 576. It must be continued for the statutory period: *Marcy v. Stone*, 8 Cush. 4; 54 Am. Dec. 736.

FRAUDULENT CONVEYANCES — DEED ABSOLUTE ON ITS FACE, GIVEN TO SECURE DEBT.—An absolute deed given to secure a debt is void as against bona fide creditors, because it does not state the real nature of the transaction: *North v. Belden*, 13 Conn. 876; 35 Am. Dec. 83. A conveyance absolute in terms, accompanied by a secret trust, that the creditors to whom it is made shall hold the property merely as security, and shall hold any balance, realized after the discharge of his debt, subject to the order of his debtor, is fraudulent: *McCulloch v. Hutchinson*, 7 Watts, 434; 32 Am. Dec. 776; *Roberts v. Barnes*, 127 Mo. 405; 48 Am. St. Rep. 640, and note.

EXECUTIONS—COLLATERAL ATTACK.—An execution prematurely issued on a valid judgment is irregular and voidable but not void; and although it may be set aside in a direct proceeding, a sale under it cannot be collaterally impeached: *Waldrop v. Freeman*, 90 Ala. 157; 24 Am. St. Rep. 775, and note; *Drake v. Harrison*, 69 Wis. 99; 2 Am. St. Rep. 717. See *Eddy v. Coldwell*, 23 Or. 163; 37 Am. St. Rep. 672.

EXECUTION—CLERICAL ERRORS.—Mere clerical errors and failure to recite the judgment with strictness do not avoid the execution: *De Loach v. Robbins*, 102 Ala. 288; 48 Am. St. Rep. 46, and note. Such clerical errors are not material if the execution describes the judgment upon which it is based, so that it may be identified: *Alexander v. Miller*, 18 Tex. 893; 70 Am. Dec. 314, and note; *Stewart v. Severance*, 43 Mo. 322; 97 Am. Dec. 392.

COOPER v. WYMAN.

[122 NORTH CAROLINA, 784.]

PROCESS—EXEMPTION FROM SERVICE OF NONRESIDENTS.—Summons or other civil process cannot be served upon a non-resident who comes into the state for the sole purpose of attending a litigation in the courts of that state as a suitor or a witness.

PROCESS—EXEMPTION FROM SERVICE OF—TIME COVERED.—NON-RESIDENTS who come into the state for the purpose of attending its courts either as suitors or witnesses are exempt from the service of civil process from the time of their coming, and until they have had reasonable time for returning.

PROCESS—EXEMPTION FROM SERVICE OF—NON-RESIDENTS' REMEDY.—Service of civil process upon a non-resident suitor or witness while attending the courts of the state as such suitor or witness is not void but voidable. His remedy is not by motion to dismiss the action, but by motion on special appearance to set aside the return of the service. If the motion is denied the ruling may be reviewed on appeal.

JUDGMENTS REFUSING TO DISMISS ACTIONS ARE NOT APPEALABLE.—The remedy is to note an exception to the refusal to grant the motion to dismiss and have it considered an appeal from the final judgment.

Davidson & Jones and F. A. Sondley, for the appellant.

⁷⁸⁵ **CLARK, J.** The defendant is a nonresident of this state and was served with a summons in this action while attending Swain superior court to prosecute an action, in which he was sued, as a witness in his own behalf, and the affidavit (which was taken as true, not being controverted) states that he was not in this state for any other purpose whatever.

The motion to dismiss the action was properly refused, but the point relied on, which should regularly have been raised by a motion to strike out the return of service, is that a summons or other civil process cannot be served upon a nonresident who comes into this state for the sole purpose of attending a litigation in our courts as suitor for witness. This is the well-established rule of law and the very numerous cases to that effect are collected in some eighteen pages of small type in the notes to *Mullen v. Sanborn*, 25 L. R. Ann. 721; 79 Md. 364; 47 Am. St. Rep. 421. They represent so universal and so uniform a holding upon the point that it is unnecessary to do more than refer to them. The rule is thus stated in *Rorer on Interstate Law*, 26: "It is the policy of the law to protect [nonresident] suitors and witnesses from service of process in civil actions, whether the process be such as requires their arrest or be merely in the nature of a summons. Service in such cases will be set aside as well upon general principles as upon positive law, if there

is such." As stated in many of the cases, this settled rule is based upon high considerations of public policy, not upon statutory law, since ⁷⁸⁶ it is the public interest that suitors and witnesses from other states who cannot be compelled to attend our courts, may not be deterred from voluntarily appearing by fear of being served with process in other actions, their presence, if obtainable, being calculated to enable the courts to more thoroughly educe the truth of the matters in litigation: *Baldwin v. Emerson*, 16 R. I. 304; 27 Am. St. Rep. 741.

In some few of the earlier cases, it was questioned whether the privilege was not restricted to witnesses, but all the later and better considered cases embrace parties as well as witnesses, more especially since the change which enables parties to be examined as witnesses: *Matthews v. Tufts*, 87 N. Y. 568; *Juneau Bank v. McSpedan*, 5 Biss. 64. No one is hurt by this exemption since, if it did not exist, the nonresidents would not come here, and service of summons on them could not be made any way: *Sherman v. Gundlach*, 87 Minn. 118; *Ballinger v. Elliott*, 72 N. C. 596.

The exemption covers the time of their coming, stay, and reasonable time for returning—*eundo, morando, et redeundo*—but the exemption is strictly restricted to those instances in which the persons claiming it is in this state for the purpose of attending the litigation as a party or as a witness, and for no other purpose whatever. If he is here for no other cause besides attendance upon the suit, the ground of the exemption ceases and he is subject to service of process. There is also an exception where there is an action brought against a plaintiff for maliciously bringing the very action which he comes to the state to prosecute: *Mullen v. Sanborn*, 79 Md. 364; 25 L. R. Ann. 721; 47 Am. St. Rep. 421.

The exemption, being long and universally recognized, and not being statutory, could only be repealed by an ⁷⁸⁷ express statute, which no state has passed. In many states, as in this (code, sec. 1367, 1735), there are statutes prohibiting the arrest in civil actions of parties attending court as witnesses or jurors. But this is held (Cooley, C. J., in *Mitchell v. Huron Circuit Judge*, 53 Mich. 541; *Andrews v. Lembeck*, 46 Ohio St. 38; 15 Am. St. Rep. 547; *Wilson v. Donaldson*, 117 Ind. 356; 10 Am. St. Rep. 48, and in many other cases) not to be an implied repeal of the common-law exemption, but a statutory declaration of it *pro tanto*, and, indeed, in certain respects it differs materially from the common-law rule, since, while limited to civil

arrest of witnesses and jurors, it is extended to all of those, whether residents of the state or not, and whether having other business at the county town or not; whereas the common-law immunity extends only to parties and witnesses who are non-residents of the state and who have no other business in this state, and protects them not only from arrest in civil actions but from the service of summons or any other civil process whatever. Indeed, the common-law exemption rests upon an entirely different reason from the statutory exemption from arrest, the latter being that witnesses and jurors shall not be hindered from discharging their duties as such, which they have been summoned by the law to perform; hence, jurors and witnesses resident in this state can be served with summons or any process, other than arrest; while the common-law exemption of nonresident parties and witnesses is from service of any process, and is for the precisely opposite reason that the law cannot compel their attendance in this state, and they should be encouraged to come that the due administration of justice may have the advantage of their presence and examination.

⁷⁸⁸ Service in such cases is not void, but voidable; hence, the party, before appearing in the action, should by special appearance move to set aside the return of service (*Thornton v. American Writing-Machine Co.*, 83 Ga. 288; 20 Am. St. Rep. 320), and, if the motion is denied, should request the judge to find the facts and enter them on the record together with the exception to the ruling, so that it may come up for review on the appeal from final judgment: *Guilford v. Georgia Co.*, 109 N. C. 310.

The well-settled rule that no appeal lies from a refusal to dismiss an action (*Guilford v. Georgia*, 109 N. C. 310, and numerous other cases cited in *Clark's Code*, 2d ed., 559, and supplement thereto, p. 83) is based upon the patent reason that if an appeal lay in any case from a refusal to dismiss, a defendant could in every case get from six to eighteen months' delay by such motion. The presumption is always that the judge correctly refused the motion to dismiss, and if it is in doubt the point can be decided on the appeal from the final judgment. But while, by a long line of uniform decisions, such appeals do not lie, the court in a proper case has often discussed and expressed its opinion upon the point intended to be presented, when there were circumstances which justified its doing so: *State v. Wylde*, 110 N. C. 500, and such is the case here. On

motion to that effect, the return on the summons as "served" should be stricken out.

Appeal dismissed.

PROCESS—EXEMPTION FROM SERVICE—NONRESIDENTS.—A nonresident suitor coming into this state to attend the trial of his case is privileged from the service of civil process while coming to, attending upon, and returning from the court trying the cause: *Fisk v. Westover*, 4 S. Dak. 233; 46 Am. St. Rep. 780, and note. This privilege is a very ancient one, and extends to every proceeding of a judicial nature taking place in or emanating from, a duly constituted tribunal which directly relates to the trial of the issue involved: *Parker v. Marco*, 136 N. Y. 585; 32 Am. St. Rep. 770, and note. It extends to witnesses as well as parties, to the service of summons as well as to arrest: *Cameron v. Roberts*, 87 Wis. 291; 41 Am. St. Rep. 43, and note. Service of process in violation of this privilege should be vacated on motion: *Parker v. Marco*, 136 N. Y. 585; 32 Am. St. Rep. 770. See *Malloy v. Brewer*, 7 S. Dak. 587; 58 Am. St. Rep. 856, and note.

APPEAL—WHAT DETERMINATIONS ARE REVIEWABLE.—Whether an order is appealable or not depends more upon what it purports to determine than upon its actual effect. The general rule is, that an appeal lies from an order only when it determines the action or affects some substantial right of the appellant: Extended note to *Davie v. Davie*, 20 Am. St. Rep. 173. Thus a refusal to order a nonsuit is not reviewable in the supreme court: *Mobley v. Bruner*, 59 Pa. St. 481; 98 Am. Dec. 360; *United States Tel. Co. v. Wenger*, 55 Pa. St. 262; 93 Am. Dec. 751.

GREENLEE v. SOUTHERN RAILWAY COMPANY.

[122 NORTH CAROLINA, 977.]

RAILROAD COMPANIES — SELF-COUPPLERS — NEGLIGENCE.—The failure of a railway company to equip its freight-cars with self-coupling devices is negligence per se, for which it is liable in damages to an employé who receives an injury while coupling cars by hand, whether he is guilty of contributory negligence or not.

RAILROAD COMPANIES — SELF-COUPPLERS — NEGLIGENCE—ASSUMPTION OF RISK.—Although an employé remains in the service of a railway company, knowing that its cars are not equipped with self-couplers, as required by law, it is liable to him for an injury received while coupling its cars by hand.

MASTER AND SERVANT—ASSUMPTION OF RISK.—The doctrine of assumption of risk has no application where the law requires the adoption of new devices to save life or limb, and the employé, either ignorant of that fact or expecting daily compliance with the law, continues in the service with the appliances formerly in use.

Action to recover damages for personal injury caused by negligence. The plaintiff was employed in the yard of the defendant company to shift and couple cars, and was injured while coupling its cars by hand. These cars were not equipped with

self-couplers, but the plaintiff had been instructed when employed not to couple cars by hand, but to use a stick. Plaintiff recovered a verdict and judgment for fifteen hundred dollars, and the defendant company appealed.

G. F. Bason, C. Price, and A. B. Andrews, Jr., for the appellant.

E. J. Justice and J. T. Perkins, for the appellee.

⁹⁷⁸ CLARK, J. In any aspect of this case the defendant is liable, whether the plaintiff was or was not guilty of contributory negligence for the negligence of the defendant in not having self-couplers, and in sending a man to couple cars at all was a continuing negligence which existed subsequent to the contributory negligence, if there had been any, of the plaintiff and was the proximate cause, the *causa causans*, of the injury.

Six years ago (1892), in *Mason v. Richmond etc. R. R. Co.*, 111 N. C. 482, 487, 32 Am. St. Rep. 814, the court, in considering "whether the defendant company was negligent in failing to provide what is known as the 'Janney,' or some other improved coupler which would obviate the necessity under any circumstances of going between the ends of cars in order to fasten one to another," said: "We think that the time ⁹⁷⁹ has arrived when railroad companies should be required to attach such couplers on all passenger-cars and the new couplers have now become so cheap, as compared to the value of the lives and limbs of servants and passengers, that it is not unreasonable to require that they provide them on peril of answering for any damage which might have been obviated by their use." While the court declined on account of the expense to hold that the same was true at that time as to freight-cars, it added: "Doubtless the day will soon come" when it would be negligence not to attach them to freight as well as passenger-cars. Congress so thought, and in 1893 passed an act (27 U. S. Stats. at Large, 531) requiring self-couplers and air-brakes to be placed on all cars, freight as well as passenger, by January 1, 1898, and this had been complied with as to "over sixty per cent of the freight-cars" besides nearly all passenger-cars, operating in interstate commerce, by that date. In *Witsell v. West Asheville etc. Ry. Co.*, 120 N. C. 557, the above citation from *Mason v. Richmond etc. R. R. Co.*, 111 N. C. 482, 32 Am. St. Rep. 814, was approved, and the court held that, while it was not negligence to fail to provide the latest improved appliances, a railroad company was liable for

any injury caused by the failure to use approved appliances that are in general use.

The railroad companies have of late procured from the interstate commerce commission an extension, till January 1, 1900, of the time by which self-couplers must be placed upon all freight-cars used in interstate service, but this was for their accommodation, and did not and could not relieve them from the legal liability incurred for injuries caused by their failure to provide "suitable appliances in general use" where the use of such would have prevented the injury. It only relieved them from the penalty provided in the act of Congress.

¹⁸⁹⁰ The eleventh annual report (1897) of the interstate commerce commission, issued by authority of the United States government and based upon the reports of the railroad companies themselves, shows (page 80) that of railroad employes (leaving out passengers altogether) 1,861 were killed and 29,969 were wounded in the year ending June 30, 1896, being greater loss than in many a battle of historic importance. Of the trainmen, this report (page 130) shows that nearly one in nine had been killed or wounded that year—a total of over 17,000. Of these casualties it is officially stated 229 were killed and 8,457 were wounded in this single particular of coupling and uncoupling cars. As these figures are reported by the corporations themselves, it is not probable that they are overstated. If the railroads not reporting to the interstate commerce commission (because not engaged in interstate carrying) should be added, the figures of killed and wounded from this cause would doubtless be largely increased. By these figures, for the last year reported, nearly 9,000 men had been killed and wounded in coupling and uncoupling cars. As the corporations, on their own motion or under compulsion of Congressional action and judicial decision, have adopted self-couplers on the passenger-cars and on "over sixty per cent" of the freight-cars, it will be seen how many thousands of lives and bodies have been saved thereby, but that still nearly 9,000 men should in one year be killed or wounded "coupling and uncoupling cars" on the freight-cars which, up to June 30, 1896, still lacked self-couplers, is the highest proof of the duty of the courts to enforce liability for failure to provide self-couplers in every case where an injury occurs from that cause. That nearly 9,000 men should still be killed and wounded in one ¹⁸⁹¹ year for failure to furnish appliances which are so widely in use and which would entirely prevent such accidents, points out the duty of the courts.

In *Witsell v. West Asheville etc. Ry. Co.*, 120 N. C. 562, this

court says: "If an appliance is such that the railroads should have it, the poverty of the company is no sufficient excuse for not having it." But in fact this defendant reports that it has issued bonds and stocks to the amount of \$76,557 per mile (N. C. R. R. Com. Report, 1896, 246). This is presumed to have been paid in by its issuing them, and hence it should be able to furnish appliances which will protect its employes from such injuries as this, and should be held liable for failure to do so, especially as the interstate commerce commission report shows that the self-couplers can be put on at the cost of \$18 per car.

In a large majority of the states, as well as by the federal government, railroad commissions have been created to supervise and regulate the charges and the conduct of these corporations. The courts will be very derelict in their duty if they do not enforce justice in favor of employes as well as the public. Six years ago this court said it would soon be negligence per se whenever an accident happened for lack of a self-coupler. Congress has enacted that self-couplers should be used. For their lack this plaintiff was injured. It is true the defendant replies that the plaintiff remained in its service, knowing it did not have self-couplers. If that were a defense, no railroad company would ever be liable for failure to put in life-saving devices, and the need of bread would force employes to continue this annual sacrifice of thousands of men.

But such is not the doctrine of "assumption of risk." That is a more reasonable doctrine and is merely that ⁹⁸² when a particular machine is defective or injured, and the employe, knowing it, continues to use it, he assumes the risk. That doctrine has no application where the law requires the adoption of new devices to save life or limb (as self-couplers), and the employe, either ignorant of that fact or expecting daily compliance with the law, continues in service with the appliances formerly in use.

The defendant, after notice of six years from this court, and with notice of the act of Congress, and also from the general adoption of self-couplers that it should use them, was guilty of negligence in failing to do so. The injury to the plaintiff could not have occurred save for the failure of the defendant to comply with its duty in this regard, and the court below should have held it liable to the plaintiff upon the defendant's own evidence. Hence, if there was error, which we do not admit, it was necessarily harmless error. There was plainly no error upon the issue as to the amount of damages.

Affirmed.

MR. CHIEF JUSTICE FAIRCLOTH and Mr. Justice Finches dissented, on the ground that plaintiff was guilty of contributory negligence which prevented him from recovering, and that "by accepting service under the defendant to work in its yard in shifting and coupling cars, he accepted all the ordinary risks of this service, without the special instruction not to couple with his hands."

Railroads—Duty to Furnish Improved Appliances.*

The general principles of law deducible from the authorities relative to the duty of a railroad company or master to furnish employes with suitable appliances with which to perform their work, are well stated by Mr. Justice Lamar in delivering the opinion of the court in *Washington etc. R. R. Co. v. McDade*, 135 U. S. 554-570, where it is said that "neither individuals nor corporations are bound, as employers, to insure the absolute safety of the machinery or mechanical appliances which they provide for the use of their employes. Nor are they bound to supply the best and safest or newest of those appliances for the purpose of securing the safety of those who are thus employed. They are, however, bound to use reasonable care and prudence for the safety of those in their service by providing them with machinery reasonably safe and suitable for the use of the latter.

"If the master falls in this duty of precaution and care, he is responsible for any injury which may happen through a defect of machinery which was, or ought to have been, known to him, and was unknown to the employe or servant. But if the employe knew of the defect in the machinery from which the injury happened, and yet remained in the service and continued to use the machinery without giving any notice thereof to the employer, he must be deemed to have assumed the risk of all danger reasonably to be apprehended from such use and is entitled to no recovery."

The test of liability of an employer to an employe for injury received in the course of the employment is not danger but negligence; and as to machinery and appliances, the employer is bound to furnish such only as are of the character ordinarily used and of reasonable safety, and the former is the conclusive test of the latter: *Kehler v. Schwenk*, 144 Pa. St. 348; 27 Am. St. Rep. 633; *Reese v. Hershey*, 163 Pa. St. 253; 43 Am. St. Rep. 795.

As a general rule, where an appliance, not obviously dangerous, has been in daily use for years, and has uniformly proved adequate, safe and convenient, it may be continued without the imputation of negligence; *Lafflin v. Buffalo etc. R. R. Co.*, 106 N. Y. 136; 60 Am. Rep. 433. A master is not bound to furnish the best known appliances for the work in which his servant is engaged, but only such as are reasonably fit and safe. He satisfies the requirements of the law if, in the selection of machinery and appliances, he uses that degree of care which a man of ordinary prudence would use, having regard to his own safety in selecting them for his individual use.

*REFERENCE TO MONOGRAPHIC NOTES.

Safe machinery and appliances, duty of master to furnish: 92 Am. Dec. 213-221; 64 Am. Rep. 726, 730; 60 Am. Rep. 75-79.

Where several appliances are in use, each of which are regarded by men of skill and experience as safe and proper, the master is not liable, where, in selecting the appliance which causes the injury to his servant, he took the one which, according to his judgment and that of skilled men under him, was the best.

It is negligence, and not error in judgment, which imposes liability: *Harley v. Buffalo Car Mfg. Co.*, 142 N. Y. 34. Nor is the master liable to his servant merely because he has not adopted recent improvements that afford some additional protection: *Ennis v. Maharajah*, 40 Fed. Rep. 784. Nor is he required to furnish the best appliances known, nor to subject such as he does supply to an analysis to determine what hazard may be incurred in their use: *Allison Mfg. Co. v. McCormick*, 118 Pa. St. 519; 4 Am. St. Rep. 613.

A master is not obliged to furnish his workmen with the best known or best conceivable appliances, but those which are reasonably safe and suitable for the work; in other words, such as the master, as a prudent man, would furnish if his own life were exposed to the dangers of the work: *Burke v. Witherbee*, 98 N. Y. 562. A railroad company is not required by its duty to its employes to adopt every new invention or appliance which may be useful in its business, and which may serve to diminish the risks to life, limb or property incident to its service. It is sufficient to adopt such as are ordinarily used by prudently conducted roads, engaged in like business, and surrounded by like circumstances: *Louisville etc. R. R. Co. v. Allen*, 78 Ala. 494. This rule was followed and adopted in *Georgia etc. Ry. Co. v. Propst*, 83 Ala. 518, and *Richmond etc. R. R. Co. v. Jones*, 92 Ala. 218, with the qualification that it was the duty of railroads to keep themselves reasonably abreast of the times with improved methods so as to lessen the danger attendant on the service, and, while not required to adopt every new invention, it was their duty to adopt such as are in ordinary use by prudently conducted roads engaged in like business and surrounded by like circumstances. To the same effect is *St. Louis etc. Ry. Co. v. Davis*, 54 Ark. 389; 26 Am. St. Rep. 48.

If drawheads and bumpers used by a railroad company or its freight-cars are such as are employed by many well-conducted roads, this repels all imputation of negligence founded on their mere structure, although other roads, or even a majority of them, have adopted a different pattern: *Georgia etc. Ry. Co. v. Propst*, 83 Ala. 518-526. In *Louisville etc. R. R. Co. v. Hall*, 91 Ala. 112; 24 Am. St. Rep. 863, it was again held that railroads are not required to adopt every appliance which even a majority of the well-regulated roads have adopted. Something must be accorded to diversity of judgment, and the failure to adopt a particular appliance is not negligence per se, though the majority of other roads have adopted it. Thus the failure to maintain whipping straps to warn brakemen who are on top of a train that it is about to pass under a bridge so low as to imperil their lives is not negligence, unless such straps are so manifestly serviceable as to command the consensus of judgment of intelligent railroad men who do not honestly differ in opinion as to their utility.

It is perfectly well settled that neither individuals nor corpora-

tions are bound, as employers, to insure the absolute safety of the machinery or appliances provided by them for the use of their employes. Nor are they bound to supply the best, safest, or newest known appliances for the purpose of securing the safety of those employed. The master discharges his duty toward his employe in that respect if he furnishes appliances which are in common and general use throughout the country in the same or similar lines of work: *Shadford v. Ann Arbor etc. Ry. Co.*, 111 Mich. 390; *Mississippi River etc. Co. v. Schneider*, 74 Fed. Rep. 195; *Wormell v. Maine Cent. R. R. Co.*, 79 Me. 397; 1 Am. St. Rep. 321; *Titus v. Bradford etc. R. R. Co.*, 136 Pa. St. 318; 20 Am. St. Rep. 944; *Nix v. Texas Pac. Ry. Co.*, 82 Tex. 473; 27 Am. St. Rep. 897; *Railway Co. v. Aiken*, 89 Tenn. 245; *Augerstein v. Jones*, 139 Pa. St. 183; 23 Am. St. Rep. 174; *Monmouth Mining etc. Co. v. Erling*, 148 Ill. 521; 39 Am. St. Rep. 187; *Texas etc. Ry. Co. v. Rhodes*, 71 Fed. Rep. 145; *Pittsburgh etc. Ry. Co. v. Stentmeyer*, 92 Pa. St. 276; 37 Am. Rep. 684; *Gravelle v. Minneapolis etc. Ry. Co.*, 11 Fed. Rep. 569; *Cagney v. Hannibal etc. R. R. Co.*, 69 Mo. 416.

An employer does not undertake with the employe that he will use the very best appliances, nor is he called upon to discard machinery adopted by him in his business reasonably suited therefor, although there may be other machinery that may be safer. He is bound only to reasonable care in providing machinery and appliances in view of all the circumstances. Still less is the master liable in damages for error in judgment in selecting one method of prosecuting his business, or one kind of machinery or appliance, on proof that another method or appliance is better or safer, when both are in common use: *Cisco v. Lehigh etc. Ry. Co.*, 145 N. Y. 296; citing *Frace v. Railroad Co.*, 143 N. Y. 182; *Flinn v. R. R. Co.*, 142 N. Y. 11. A master is not bound to change his machinery in order to apply every new invention or supposed improvement in appliance, and he may even have in use an appliance shown to be less safe than another in general use without being liable to his servant for the consequences of the use of it: *Wonder v. Baltimore etc. R. R. Co.*, 32 Md. 411; 3 Am. Rep. 143; *Lake Shore etc. R. R. Co. v. McCormick*, 74 Ind. 440; *Homestead Mining Co. v. Fullerton*, 69 Fed. Rep. 923, 929; *Sheets v. Chicago etc. Ry. Co.*, 139 Ind. 682-688. A master is not bound to adopt every latest improvement and the selection and retention of appliances in general use which are reasonably adapted to the purpose, although better ones are used by others, or later devices have overcome observed defects therein, do not prove negligence, nor do defects, not rendering a generally used appliance positively unsafe, indicate negligence, unless ordinary care would have disclosed such defect: *Sappenfield v. Main Street etc. R. R. Co.*, 91 Cal. 48.

A railroad company is not liable to an employe for injury caused by the use of a particular appliance, when such appliance is one of several different kinds all in common use at the time of the accident. The railroad company does not insure the safety of its employes, and when an employe undertakes such hazardous duties as coupling cars, he assumes the risk incident to their discharge from open and obvious causes, the dangerous nature of which he has an opportunity

to ascertain. The company is not bound to furnish the safest appliances nor provide the best methods for their operation in order to be free from responsibility for accidents resulting from their use. The unbending test of negligence in methods and appliances is the ordinary usage of the business: *Dooner v. Delaware etc. Canal Co.*, 171 Pa. St. 581; *Wormell v. Maine Cent. R. R. Co.*, 79 Me. 397; 1 Am. St. Rep. 321; *Lehigh etc. Coal Co. v. Hayes*, 128 Pa. St. 294; 15 Am. St. Rep. 680. A railroad company is not required to furnish for the use of its employes, cars, tenders, and appliances which are absolutely safe, or of the most approved pattern; its duty is to furnish only such as are reasonably safe: *Gardner v. St. Louis etc. Ry. Co.*, 185 Mo. 90; *Galveston etc. Ry. Co. v. Garrett*, 73 Tex. 262; 15 Am. St. Rep. 781; *Kern v. De Castro etc. Co.*, 125 N. Y. 50. An employer is not bound to supply his employes with appliances not in general use, and when he furnishes such as, with ordinary care and reasonable diligence, may be used without danger, he has discharged his duty and is not liable for accidents resulting: *Lehigh Coal Co. v. Hayes*, 128 Pa. St. 294; 15 Am. St. Rep. 680; *Iron Ship etc. Works v. Nuttall*, 119 Pa. St. 149. Thus, if an employe engages in the hazardous employment of coupling railway cars, it by no means follows that the railroad company is liable to him because a particular accident might have been prevented by some special device or precaution not in common use: *Central Ry. Co. v. Husson*, 101 Pa. St. 1-7; 47 Am. Rep. 690. If a coupling of a particular kind is in general use among railroad companies, it is not negligence to use it: *Martin v. California etc. Ry. Co.*, 94 Cal. 326; *Whitwam v. Wisconsin etc. R. R. Co.*, 58 Wis. 408.

In North Carolina, the rule is well settled, in accordance with the holding in the principal case, that it is negligence on the part of the railroad company not to adopt and use all approved appliances which are in general use and necessary for the safety of its employes or passengers: *Witsell v. West Asheville etc. Ry. Co.*, 120 N. C. 557; *Mason v. Richmond etc. R. R. Co.*, 111 N. C. 482; 32 Am. St. Rep. 814; and expressions may be found in some of the books which uphold this doctrine, which is not general, by any means, as has been shown by the foregoing part of this note. Thus in *St. Louis etc. Ry. Co. v. Vallirius*, 56 Ind. 511-520, it was said that "it is the imperative duty of railway companies to adopt and use all improvements in cars and machinery calculated to insure safety to employes and passengers: *Witsell v. West Asheville etc. Ry. Co.*, 120 N. C. 557; machinery, or such parts thereof as may be dangerous to use." But it must be remembered that this holding was expressly disapproved in *Lake Shore etc. R. R. Co. v. McCormick*, 74 Ind. 440-446, where the court said that: "Neither companies nor individuals are bound, as between themselves and their servants, to discard and throw away their implements or machinery upon the discovery of every new invention which may be thought or claimed to be better than those they may have in use, but if they take ordinary care and exercise ordinary prudence to keep their implements or machinery in sound repair, they are not responsible to servants for any injury which may occur to them in the use of such implements or machinery."

And again in *Jenney Electric Light etc. Co. v. Murphy*, 115 Ind. 566-568, it was said that "the employer does not, however, become the insurer of the employé against injury, nor does he covenant to supply tools and appliances that are safe beyond peradventure or contingency, nor to furnish implements of the best or most approved or of any particular design." These cases were approved and followed in *Sheets v. Chicago etc. Ry. Co.*, 139 Ind. 682. In a New York case, *Smith v. New York etc. R. R. Co.*, 19 N. Y. 127-133, 75 Am. Dec. 305 the expression is found that "it has been held that railroad companies are bound to avail themselves of all new inventions and improvements known to them which will contribute materially to the safety of their passengers whenever the utility of such improvement has been thoroughly tested and demonstrated: *Hegeman v. Western R. R. Co.*, 3 Kern. 9." To the same effect is *Steinwig v. Erie Ry.*, 43 N. Y. 123; 3 Am. Rep. 673. But in *Cisco v. Lehigh etc. Ry. Co.*, 145 N. Y. 296, it was held that an employer does not undertake with his employé to use the very best appliances nor is he called upon to discard machinery reasonably suited to his business, though there may be other and safer machinery, at least when the appliances used by him are in common use in the business. He is simply bound to exercise reasonable care in providing appliances in view of all the circumstances. To the same effect is *Burke v. Witherbee*, 98 N. Y. 562. In Illinois, it has been held that it is the duty of railway companies to furnish good, well-constructed machinery and appliances, adapted to the purposes of its use, of good material and of the kind that is found to be the safest when applied to use, and while they are not required to seek and apply every new invention, they must adopt such as are found by experience to combine the greatest safety with practical use: *Toledo etc. Ry. Co. v. Ashbury*, 84 Ill. 429; *Chicago etc. R. R. Co. v. Quaintance*, 58 Ill. 389.

In a Wisconsin case, *Dorsey v. Phillips etc. Construction Co.*, 42 Wis. 583-596, it was said that "if a uniform custom of railroad companies to use structures unnecessarily dangerous to persons employed in operating trains had been proved, we should hesitate gravely before holding that the custom would excuse the danger. A positive acquiescence-scienter, of one so employed, might, indeed, take away his right of action from injury incurred by such a structure. But there is a public, as well as a private, interest. The operation of railroad trains is essentially highly dangerous, and it is the duty of railroad companies, too plain for discussion, to use all reasonable skill to mitigate, tolerating nothing to aggravate the necessary danger." In Nebraska, a statute requires all railroad companies to equip all their cars with automatic couplers, and they are guilty of negligence if they do not comply with such statute: *Thompson v. Missouri etc. Ry. Co.*, 51 Neb. 527. It does not constitute negligence in a railway company, in the ordinary course of business, to receive and transport the cars of other roads, in general use, which may not be constructed with the most approved appliances, and the transportation or use of such cars by the company is one of the risks which an employé assumes when he undertakes the employment: *Baldwin v. Chicago etc. R. R. Co.*, 50 Iowa. 680; *Peirce v. Bane*, 80 Fed. Rep. 988; *Kohn v. McNulta*, 147 U. S. 238.

STATE v. HORD.

[122 NORTH CAROLINA, 1092.]

MUNICIPAL CORPORATIONS—ORDINANCES TO PREVENT NUISANCES.—Town authorities have authority to prohibit by ordinance the keeping of hogpens in the town to such an extent as they may deem necessary to prevent nuisances to the public, and they are the sole judges of the limits to be prescribed, unless such ordinance is clearly unreasonable.

NUISANCES ARE INJURIES TO THE PUBLIC or to others, and not injuries or annoyances which a person causes to himself and family.

MUNICIPAL CORPORATIONS—ORDINANCE TO PREVENT NUISANCES—DISCRIMINATION.—A municipal ordinance forbidding any citizen in a town from keeping hogpens within one hundred yards of the residence of another is reasonable and valid and not void as making unjust discrimination.

Civil action for violation of a municipal ordinance. Verdict of guilty, and defendant appealed.

Jones & Tillett, and Osborn, Maxwell & Keerans, for the appellant.

Z. V. Walser, attorney general, and E. Y. Webb, for the state.

1094 **CLARK, J.** The code, section 3802, confers on every town and city the power "to pass laws for abolishing or preventing nuisances and for preserving the health of the citizens." Under such authority the board of town commissioners could forbid the keeping of hogpens in the town to such an extent as they might deem necessary to prevent nuisances to the public, and, indeed, they could have done so without this express authority: 2 Kent's Commentaries, 340; 1 Dillon on Municipal Corporations, 4th ed., sec. 369. In a thickly settled town, the town ordinances usually forbid the keeping of hogpens altogether, not because they may be injurious to the owner of the hogs, but because they are nuisances to the public. In a less thickly settled town, as King's Mountain, a prohibition of hogpens within one hundred yards of another's dwelling may be a sufficient protection against a nuisance to the public; of that the commissioners, the local legislature, are the sole judges (*Hill v. Board of Aldermen of Charlotte*, 72 N. C. 55; 21 Am. Rep. 451), unless their ordinance is unreasonable. In the more thickly settled parts of the town the prohibition of a hogpen within one hundred yards of the residence of another will be a prohibition of keeping hogpens altogether. The object of the ordinance is not to prevent a man from injuring himself by keeping his hogpen too near his

own house, for that is a matter he can remedy at will, but to protect the public against a nuisance which they have no power to prevent except through the authority of a town ordinance acting on the offender.

A nuisance is to the public, or to others, and not an injury or annoyance which a person causes to himself and family. It is an anomaly that the defendant, who has disobeyed the ordinance forbidding him to commit a nuisance upon the public, should be complaining that the town did not go further and forbid him being a nuisance ¹⁰⁹⁵ to himself. He could refrain from that without official help.

There is no discrimination in this ordinance, for it forbids all citizens alike from keeping hogpens within one hundred yards of the residence of another. The learned counsel of the defendant, however, frankly admitted that it is not every discrimination which would make a town ordinance invalid, and that this would be the case only when the discrimination is an unreasonable one: *State v. Call*, 121 N. C. 643, 648; *Slaughterhouse cases*, 16 Wall. 36.

No error.

MUNICIPAL CORPORATIONS—POWER TO DECLARE NUISANCE.—Under a general grant of power over nuisances, town authorities have no power to adopt an ordinance declaring a thing a nuisance which in fact is clearly not one, but in doubtful cases, depending upon a variety of circumstances requiring judgment and discretion, their action is conclusive: *Harmison v. Lewiston*, 153 Ill. 313; 46 Am. St. Rep. 893, and note. See *Grossman v. Oakland*, 30 Or. 478; 60 Am. St. Rep. 832, and note; *Walker v. Jameson*, 140 Ind. 591; 49 Am. St. Rep. 222. Under such power, a city may regulate the location of livery stables within its limits: *Chicago v. Stratton*, 162 Ill. 494; 53 Am. St. Rep. 325; though a stable is not *prima facie* a nuisance: *Burditt v. Swenson*, 17 Tex. 489; 67 Am. Dec. 665, and note; extended note to *Shiras v. Olinger*, 32 Am. Rep. 141-143. Likewise, it may declare a slaughter house within town limits a nuisance: *Harmison v. Lewiston*, 153 Ill. 313; 46 Am. St. Rep. 893, and note; a slaughter house so located being *prima facie* a nuisance: *Catlin v. Valentine*, 9 Paige 575; 38 Am. Dec. 567; *Selfried v. Hayes*, 81 Ky. 377; 50 Am. Rep. 167. But an ordinance declaring that "all hogpens or lots now used as such, are hereby declared a nuisance and shall be abated," is too broad and sweeping in its provisions, and is invalid: *Ex parte O'Leary*, 65 Miss. 80; 7 Am. St. Rep. 640. See monographic note to *Milne v. Davidson*, 16 Am. Dec. 194-198.

CASES
IN THE
SUPREME COURT
OF
OHIO.

WILHELM v. DEFIANCE.

[58 OHIO STATE, 56.]

MUNICIPAL CORPORATION—SIDEWALKS—PROPERTY OWNER'S LIABILITY.—A municipal corporation may, upon proper notice, require an abutting property owner to construct a sufficient sidewalk in front of his premises, and, upon his failure to do so, may itself construct such walk and assess the cost thereof against his property, but it cannot recover indemnity from him for money paid out on a judgment against it for injury caused by his negligent construction of the sidewalk.

MUNICIPAL CORPORATIONS—SIDEWALKS—LIABILITY OF PROPERTY OWNER.—If a municipality accepts a sidewalk constructed by the owner of abutting property, pursuant to its notice, and in compliance therewith, all liability for mere negligence in construction and maintenance must rest and remain upon the city.

In compliance with an ordinance of the city of Defiance and notice received from the authorities of such city, Wilhelm, a property owner therein, undertook to build a sidewalk in front of his premises, and upon its completion it was accepted by the city. Thereafter, Mary L. Sammis, while passing along such walk, without fault on her part, sustained severe injuries, for which she recovered judgment against the city. It paid the judgment, and then brought this action against Wilhelm to recover indemnity from him, alleging that he constructed the sidewalk in a negligent manner and of defective materials, and that he left it in an unsafe and dangerous condition. Hence the injury. Judgment in favor of the city. Wilhelm appealed.

H. and E. H. Newbegin, for the plaintiff in error.

E. A. Latty, for the defendant in error.

⁶³ SHAUCK, J. In *Morris v. Woodburn*, 57 Ohio St. 330, we held that if the owner of a lot abutting upon a street of a municipality, for the use of his property, constructs a vault under the sidewalk, over which he negligently places and maintains a defective covering, he is liable directly to a footman injured thereby, notwithstanding the omission by the municipality of the duty imposed upon it by statute to keep the street in repair. And since the decisions in *Chicago v. Robbins*, 2 Black, 418, and *Robbins v. Chicago*, 4 Wall. 657, it seems to be the settled law that if a municipal corporation is held in damages for its failure to keep a sidewalk in repair by removing the source of danger so created by an abutting owner for his own personal ends, it may, having given him notice of the pendency of the suit against it, recover from him the amount which it is adjudged to pay because of his tort.

But it is not assumed that the grounds upon which recoveries were sustained in those cases are available here. The opinion of the circuit court in the present case (12 Cir. Ct. Rep. 346) shows that it was mindful of the fact that the statute imposed ⁶⁴ upon the municipality, and not upon the abutting owner, the duty of keeping the streets and sidewalks in repair and free from nuisance. It is conceded that the law imposes upon such owner no duty with respect to the walk whose mere omission could be asserted as the foundation of an action against him. According to the view there taken, Wilhelm, having assumed the duty of constructing and maintaining the walk, thereby became bound to exercise due care in the selection of materials and reasonable skill in constructing and repairing the walk, and by his failure in respect thereto he actively created the dangerous place and negligently left it unguarded, whereby he became directly liable to the person injured or to the city in the present action, it having been compelled to respond first because of its failure to perform the duty imposed upon it by the statute. No authority is cited by the circuit court in support of this view, and most of the cases cited by the city solicitor in support of the judgment relate to the points decided in *Morris v. Woodburn*, 57 Ohio St. 330, *Chicago v. Robbins*, 2 Black, 418, and *Robbins v. Chicago*, 4 Wall. 657.

The right of the municipality to recover from the wrongdoer was upheld in *Chicago v. Robbins*, 2 Black, 418, and in the cases following it, upon the ground that the recourse of the person injured is primarily against him; and the municipality, having relieved him of that liability, is subrogated to the rights of

the person injured. In *Rochester v. Campbell*, 123 N. Y. 405, 20 Am. St. Rep. 760, it was correctly said of those cases: "These were all cases where the dangerous conditions of the streets were created by the defendants, and they were held liable for the consequences of their unlawful acts, under their common-law obligations as the creators ⁶⁵ of nuisances, and not by reason of any duty enjoined upon them by statute or otherwise." Section 2640 of the Revised Statutes provides: "The council shall have the care, supervision, and control of all public highways, streets, avenues, alleys, sidewalks, public grounds, and bridges within the corporation, and shall cause the same to be kept open and in repair, and free from nuisance."

This, as has been repeatedly held, is not merely a grant of power to the municipality, but the imposition of a duty upon it. Cognate provisions of the statute authorize the municipality to require, in the mode specified, the abutting owner to construct or repair the walk in front of his premises. The effect of his failure to comply with the requirement is also defined by the statute; that upon his failure, the municipality may construct or repair the walk and assess the cost thereof upon his property. But the right of the city to be indemnified in this manner is expressly limited to one-fourth of the amount at which the property is valued for the purposes of taxation. The consequence thus indicated by the statute is exclusive. In considering the effect of similar statutory provisions in *Keokuk v. Independent Dist.*, 53 Iowa, 352, 36 Am. Rep. 226, it was said: "The city has sole authority over its streets, is charged with their improvement and repair, and vested with the power to tax for that purpose. Where the lotowner is required by the city to construct or repair a sidewalk, it is simply a method of exercising such power of taxation, by which he is made the agent of the city to expend the amount of the tax, and the responsibility for the performance of the ⁶⁶ work remains where the authority to control it is found."

In well-considered cases, it has been held that the liability which the statute imposes upon the abutting owner is exclusive and not reconcilable with an unlimited liability for injuries occasioned by the defective condition of streets and sidewalks which are constructed and maintained under the authority of the municipality, where that condition results from negligence merely: *Flynn v. Canton Co.*, 40 Mo. 312; 17 Am. Rep. 603; *Hartford v. Talcott*, 48 Conn. 525; 40 Am. Rep. 189; *St. Louis v. Connecticut Mut. Life Ins. Co.*, 107 Mo. 92; 28 Am. St. Rep. 402.

That conclusion is in harmony with the view of the subject taken in *Rochester v. Campbell*, 123 N. Y. 405, 20 Am. St. Rep. 760, where it is said that to hold the abutting property liable in an action for indemnity "would tend to relax the vigilance of municipal corporations in the performance of their duties with respect to the repair of streets and highways, and impose that duty upon those who might be utterly unable to discharge it."

The policy of the statute, as indicated by its provisions according to the doctrine of the cases cited and the numerous cases which they review, seems to require the conclusion that when a municipality accepts a sidewalk constructed by the owner of abutting property pursuant to its notice, as a compliance therewith, all liability for mere negligence in construction and maintenance must rest and remain upon it.

Judgment of the circuit court reversed and that of the common pleas affirmed.

MUNICIPAL CORPORATIONS—DEFECTIVE SIDEWALKS—ABUTTING OWNER'S LIABILITY.—Although a city may have imposed upon lotowners the public duty to keep the sidewalks in front of their premises in repair, or to raise or lower them to an established grade, yet the city, and not the owner, remains answerable in a private action for injuries resulting from his negligence or omission to act: *Betz v. Limingi*, 46 La. Ann. 1113; 49 Am. St. Rep. 844, and note. A municipal corporation cannot recover back from an owner of property fronting on one of its streets, damages which it has been compelled to pay to a person for injuries received by reason of its failure to keep the sidewalk in front of said property free from snow and ice, notwithstanding an ordinance of the city requires such owner to keep his sidewalk free from snow and ice, and imposes a penalty for its violation: *St. Louis v. Connecticut etc. Ins. Co.*, 107 Mo. 92; 28 Am. St. Rep. 402, and note citing conflicting cases. That the principal case accords with the weight of authority, see extended note to *Browning v. Springfield*, 63 Am. Dec. 855-357; *Rochester v. Campbell*, 123 N. Y. 405; 20 Am. St. Rep. 760.

FIRST NATIONAL BANK OF BELMONT v. FIRST NATIONAL BANK OF BARNESVILLE

[58 OHIO STATE, 207.]

BANKS AND BANKING — CHECKS. — LIABILITY OF DRAWEE.—The drawee of a check, draft, or bill of exchange is held to know the signature of the drawer, and makes payment at his own peril in case of forgery or otherwise.

BANKS AND BANKING—CHECKS—INDORSEMENT FOR COLLECTION—GUARANTY.—The indorsement of a check, draft, or bill of exchange "for collection," by other than the payee, is not a guaranty that the name of the drawer is genuine, but only of the genuineness of the names of the indorsers.

BANKS AND BANKING—CHECKS—INDORSEMENT “FOR COLLECTION” on negotiable paper, is notice to the drawee, and indicates on its face that the indorser remains the owner, and that his successive indorseees are only his agents for the sole purpose of collecting the paper and remitting the proceeds to him.

BANKS AND BANKING—CHECKS—FORGERY—INDORSEMENT FOR COLLECTION—NEGLIGENCE.—If the drawer of a check indorsed “for collection” has no individual account with the bank upon which it is drawn, but has an account in a trust capacity, it is negligence in the bank to pay the check and charge it to such trust account; and in case the check turns out to be a forgery, it must stand the loss.

During banking hours on June 19, 1893, one E. Horner presented to the First National Bank of Belmont a check for one hundred and five dollars, purporting to be drawn by one J. W. Horner on the First National Bank of Barnesville. The cashier of the Belmont bank, at the request of E. Horner, wrote his name on the back of the check and paid him the amount named therein. The Belmont bank then indorsed the check for collection, and, in the usual course of business, sent it to the People’s National Bank of Barnesville. The latter indorsed the check “for collection,” and presented it for payment to the drawee, the First National Bank of Barnesville, receiving payment in full. J. W. Horner had no individual account with the Barnesville bank, but had an account there as administrator. The bank, upon paying the check, charged it to the latter account. Upon settlement between Horner and such bank, he pronounced the check a forgery, and refused to allow it in his settlement. The bank then protested the check and served notice by due course of mail upon the Belmont bank that the check was a forgery, and demanded payment of that bank, which, being refused, it brought this suit. None of the banks knew that the check was a forgery, and all believed it to be genuine. The Barnesville bank recovered judgment in the circuit court reversing the judgment of the court below, and the Belmont bank appealed.

J. Pollock and N. K. Kennan, for the plaintiff in error.

Petty & Smith, for the defendant in error.

§11 BURKET, J. Since the case of *Price v. Neal*, 3 Burr. 1354, decided by Lord Mansfield in 1762, the general rule has been, and is, that when the drawee of a check or bill pays the same to a bona fide holder, such drawee cannot recover the money back upon discovering such check or bill to be a **§12** forgery. The drawee is presumed to know the signature of the drawer, and if, when the check or bill is presented to the drawee for pay-

ment, he pays the same, and it afterward turns out to be a forgery, he cannot recover the money back from the person to whom he paid it. When the drawee is a bank, there is a much stronger reason for holding it to know the signature of its depositors and customers than in the case of a private individual, because banks keep a book in which are preserved the genuine signatures of their depositors, customers, and correspondents.

That the general rule is as above stated, is shown by the following authorities: *National Park Bank v. Ninth Nat. Bank*, 46 N. Y. 77; 7 Am. Rep. 310; *Smith v. Mercer*, 6 Taunt. 76; *Wilkinson v. Johnson*, 3 Barn. & C. 428; *National Bank v. National etc. Bank*, 55 N. Y. 211; 14 Am. Rep. 232; *Frank v. Chemical Nat. Bank*, 84 N. Y. 209; 38 Am. Rep. 501; *Levy v. Bank of U. S.*, 4 Dall. 234; *Morse on Banks and Banking*, 3d ed., 463; 2 *Daniels on Negotiable Instruments*, 3d ed., secs. 1359, 1655; *Northwestern Nat. Bank v. Bank of Commerce*, 107 Mo. 402; *Commercial etc. Bank v. First Nat. Bank*, 30 Md. 11; 96 Am. Dec. 554; *Deposit Bank v. Fayette Nat. Bank*, 90 Ky. 10; *First Nat. Bank v. First Nat. Bank*, 151 Mass. 280; 21 Am. St. Rep. 450; *National Park Bank v. Seaboard Bank*, 114 N. Y. 28; 11 Am. St. Rep. 612; 5 Am. & Eng. Ency. of Law, 2d ed., 1071; *Ellis v. Ohio Life Ins. etc. Co.*, 4 Ohio St. 628; 64 Am. Dec. 610.

²¹⁸ This last case fully recognizes the general rule, but the majority of the court, two judges dissenting, held that as there was a local custom among banks at Cincinnati to the effect that before purchasing bills or checks drawn upon other banks in that city, that the purchasing bank should have the identity of the person offering to dispose of the paper fully shown, and make careful inquiry as to his right to the paper, and as to its being genuine, and that the purchasing bank in that case, having neglected the customary precautions, was guilty of such negligence as to make it liable to pay back the money received on the forged bills. The court was careful to say that it was dealing only with the case then under consideration; and the right to recover back the money in that case is founded upon the local custom, and the general rule is not modified further than to hold that, in view of the local custom, known to both banks, the purchasing bank was guilty of negligence in taking the bills from an unidentified stranger as to render it liable to pay back the money when the bills turned out to be forgeries.

It is urged that as the check was presented for payment to the drawee bank by another bank in good standing, the drawee bank had a right to presume that the check was all right, and, rely-

ing upon such presumption, it was thereby thrown off its guard, and was less careful in scrutinizing the signature to the check than if the same had been presented at its counter for payment by an individual. A holding to this effect has been made in a few cases wherein the indorsements were unrestricted, but when the indorsement is "for collection," or "for account of," it is notice to the drawee that the bank presenting the check or bill for payment ²¹⁴ is not the owner, but only the agent of the owner, and that the money is to be remitted to the owner back through the same channel through which the check or bill was received by the collecting bank. In such cases the collecting bank acts as the agent, or servant of the owner, and the drawee bank is not justified in relaxing its vigilance.

Some years ago the practice of indorsing checks "for collection," or "for account of," had become almost universal, and when it was decided in the above cases of *National Park Bank v. Seaboard Bank*, 114 N. Y. 28, 11 Am. St. Rep. 612, and *Northwestern Nat. Bank v. Bank of Commerce*, 107 Mo. 402, that the drawee bank could not recover back the money, in the one case from the collecting bank, nor in the other from the bank owning the draft, it startled the banks located in large cities, and awakened them to the dangers attending the payment of such drafts or bills, and the result was that in the year 1896, the clearing house in the city of New York adopted a rule to the effect that its members should not send through the exchanges any paper having any qualified or restrictive indorsements, such as "for collection," or "for account of," unless all indorsements were guaranteed by the bank sending such paper. This action was soon followed by the clearing houses in other cities, and in some of them all indorsements are required to be either in blank or "pay to — or order." By this action of the clearing houses, indorsements "for collection," or "for account of," have fallen into disuse, and the banking business of the country is now done, almost universally, upon unrestricted indorsements. The decisions of the courts as to the rights and liabilities of the ²¹⁵ parties to paper with unrestricted indorsements thereon, vary somewhat in different states, but in this state the general rule that the drawee bank is bound to know the signature of the drawer has not been modified further than as permitted by local custom, as in *Ellis v. Ohio Life Ins. etc. Co.*, 4 Ohio St. 628; 64 Am. Dec. 610.

It is urged that the Belmont bank, having indorsed the check, thereby guaranteed that the signatures of the drawer and in-

dorsers were genuine, and some cases are cited to that effect: *People's Bank v. Franklin Bank*, 88 Tenn. 299; 17 Am. St. Rep. 884; *First Nat. Bank v. First Nat. Bank*, 151 Mass. 280; 21 Am. St. Rep. 450.

Other cases hold that an indorser does not guarantee that the name of the drawer is genuine, but that the drawee must determine that for himself, and at his own peril: *Germania Bank v. Boutelle*, 60 Minn. 189; 51 Am. St. Rep. 519, and cases there cited.

In the cases in which it has been held that the indorsement is a guaranty, to the effect that the name of the drawer is genuine, the indorsements were unrestricted, and therefore indicated an absolute transfer and sale of the paper. But when the indorsement is for collection only, as in this case, it indicates on its face that the indorser remains the owner of the paper, and that his successive indorseees are only his agents for the sole purpose of collecting the paper, and remitting the proceeds to him. Such a restricted indorsement does not authorize a subsequent indorsee to negotiate the paper. His only power is to collect it, and the drawee bank is bound by the notice in the indorsement. Such an indorsement is not a guaranty ²¹⁶ that the name of the drawer is genuine, but only that the names of the indorsers then on the paper are genuine: *Mechanics' Bank v. Valley Packing Co.*, 70 Mo. 643; 4 Mo. App. 200; *Northwestern Nat. Bank v. Bank of Commerce*, 107 Mo. 402.

In the case now under consideration the drawer's name was a forgery, but the name of the payee indorsed on the check was genuine, having been written by the cashier at the request of the payee.

It has been urged that if the payee had been required by the cashier to write his name upon the check, that it might have shown that his name in the body of the check had been written by himself, and thus lead to a detection of the forgery. But in the above case of *First Nat. Bank v. First Nat. Bank*, 151 Mass. 280, 21 Am. St. Rep. 450, the payee indorsed the check, and the handwriting was the same in both names, payee and indorser, and yet the forgery was not thereby detected, and the court attaches no importance to the fact in its decision of the case. In that case, and in the above case in 4 Ohio St., page 628, and in nearly all the cases in which the money has been recovered back, the bank purchasing the check or bill took it from an unidentified stranger, and this has often, though not always, been held to be such negligence as would authorize a recovery of

the money. But in the case at bar the facts do not show Elwood Horner to have been a stranger to the cashier of the Belmont bank, because, as soon as he was notified of the forgery, he pointed out that Mr. Horner had died only a few days before, and that his estate was wholly insolvent. He was therefore known, and required no identification, and the cases which ²¹⁷ turn upon the unidentified stranger have no application to this case.

Again, it is conceded that J. W. Horner had no individual account with the First National Bank of Barnesville, the drawee, and that the bank charged the check to his account as administrator. This was not only irregular, but wrong. The bank should have refused payment, and allowed the check to go to protest; or if it desired to favor Mr. Horner, it should have notified him that his check was at the bank, and no funds with which to pay the same. Had this been done, the forgery would have been discovered at once, and notice would have been given to the Belmont bank, and that bank would then have had recourse on Elwood Horner, who indorsed and sold the check. Whether he was then insolvent or not does not appear, and is of no importance. The bank would have had its recourse against him within three or four days after it parted with its money, and such recourse is regarded in commercial transactions as a valuable right; and of this right the Belmont bank was deprived by the acts of the Barnesville bank in not detecting that the name of its depositor was forged to the check, and in negligently charging it to his account as administrator.

It is therefore clear that the Belmont bank was guilty of no negligence, and that the loss occurred by reason of the acts of The First National Bank of Barnesville, and that it would be unconscionable to permit it to recover the money back from the Belmont bank.

The judgment of the circuit court is therefore reversed, and that of the common pleas affirmed.

Judgment accordingly.

Minshall, J., dissents.

BANKS AND BANKING—PAYMENT OF FORGED CHECK—RIGHTS OF PARTIES.—Payment of forged checks by a bank is made at its peril, and it is not justified in charging them against the depositor's account, unless some negligent act of his in some way contributed to induce such payment in the first instance, or unless by his subsequent conduct in relation to the matter he is equitably estopped to deny the correctness of such payment: *Note to German Sav. Bank v. Citizens' Nat. Bank*, 63 Am. St. Rep. 410, 411. The drawee of a bill of exchange is held bound to know the signature of

his drawer, and the banker, even more, to know that of his depositor; and if they fail to discover the forgery before payment, they must stand the loss: See monographic note to *People's Bank v. Franklin Bank*, 17 Am. St. Rep. 890.

BANKS AND BANKING—INDORSEMENT FOR COLLECTION—INDORSER'S LIABILITY.—A bank indorsing and collecting a check warrants the genuineness of all pre-existing indorsements thereon: *First Nat. Bank v. Northwestern Nat. Bank*, 152 Ill. 296; 43 Am. St. Rep. 247. If a check or draft upon which the name of a prior indorser has been forged, is paid, the amount may be recovered back from the party to whom it has been paid or from any party who indorsed it subsequent to the forgery: See monographic note to *People's Bank v. Franklin Bank*, 17 Am. St. Rep. 898. See *Rhodes v. Jenkins*, 18 Colo. 49; 36 Am. St. Rep. 263, and note; monographic note to *Allen v. Merchants' Bank*, 34 Am. Dec. 307-317, on the liability of a bank as an agent for collection

KEYS v. PITTSBURG AND WHEELING COAL COMPANY.

[58 OHIO STATE, 246.]

COTENANCY IN COAL MINES—MEASURE OF DAMAGES FOR COAL TAKEN FROM COMMON ESTATE BY ONE COTENANT.—If a cotenant in coal lands, in good faith attempts to purchase the interests of his cotenants in the common estate, and, believing that the title to such interests will be perfected in him, in good faith enters upon such estate, mines and sells coal therefrom, but fails to get the title to the land, the measure of damages against him for the coal thus taken is the value of such coal in place at the time it was mined; and if, in operating mines on his own land that nearly surround or abut on the common estate, he has constructed passageways, tracks, cars, and other fixtures, conveniently located for removing coal from the common estate, that fact, as well as any other, natural or artificial, tending to enhance or diminish the value of the coal taken as it lay in place, must be considered in fixing such value.

Action to recover for coal mined and removed by one cotenant from land belonging to the common estate. Plaintiffs recovered judgment in the court of common pleas, which judgment was reversed on error in the circuit court, and plaintiffs appealed.

C. L. Weens and A. H. & W. Mitchell, for the plaintiffs in error.

N. K. Kennan and L. Danford, for the defendant in error.

258 **BRADBURY, J.** The particular ground upon which the circuit court reversed the judgment of the court of common pleas is left in some obscurity by the record. The only statement on the subject is, "that the court erred in its charge." As the defendant in the court of common pleas excepted to a number of different propositions found in the charge, and also to the

court's refusal to give to the jury certain propositions of law that it presented for that purpose, we are left in doubt as to which of the propositions given or refused the statement in the record refers to. The particular propositions on this subject which the circuit court held to be erroneous not being disclosed, ²⁵⁹ that omission, together with the somewhat wide range taken by the arguments found in the briefs of counsel, renders necessary a more extended consideration of the rules by which damages are to be ascertained in this class of cases than otherwise would have been pursued. However, the discussion contained in the briefs of counsel and the nature of the controversy lead quite clearly to the conclusion that the rule by which damages should be assessed was the controverted question in this connection. The record discloses no substantial controversy over the facts that establish the defendant's liability to the plaintiffs under some rule for assessing damages. Nor does any real controversy appear respecting the facts which bear on the rule by which the damages should be assessed.

The defendant, a partnership, was extensively engaged in mining and shipping coal; the mouth of its pit or entry was nearly a mile from the main line of a common carrier; it had invested large sums of money in constructing entries and tramways into its mines, a coal tipple outside of the mine and in such equipments for transporting coal from the mines to the tipple as is necessary for that purpose. It owned and had mined, or was engaged in mining, considerable tracts of coal land that were adjacent to, and surrounded on three sides, the tract in question. This tract could be conveniently, perhaps profitably, mined if the coal could be transported along the tramways of the defendant to the defendant's tipple. If it could not thus be transported, its availability for profitable mining would be doubtful. These entries had already been driven nearly to the line of the tract, a distance of about four thousand eight hundred feet from the tipple, and ²⁶⁰ of about three thousand feet from the entrance to the mine. The situation of this tract was such that to have attempted to mine the coal by constructing and equipping an entry for that purpose would have been of doubtful expediency for a number of reasons. The only outlet was too remote from a common carrier, a stream of water was inconveniently located as respects the points where an entry might be made, the entry would run against the "dip" of the vein of coal, rendering drainage of the mine and transportation of the coal both inconvenient and expensive.

The defendants had in the course of their operations approached quite near to this coal, and it could be conveniently mined by them, and a way through it to other coal owned by it would be valuable to them, but of course worthless to others. The tract of land had belonged to one Hugh Giffin, who, by will executed in 1861, devised to his wife, Jane Giffin, a life estate therein, and at her death the fee to his four children. In the year 1884, the defendant purchased the life estate of Jane Giffin, and soon afterward twenty-three twenty-eighths of the fee therein, and attempted to purchase of their father the five twenty-eighths that belonged to the plaintiffs. There seems to have been little or no material controversy respecting these negotiations. The plaintiffs are children of Alexander Keys, and an exchange of their interest in this coal for certain surface was effected by him and a representative of the defendant, the terms of which are given by Ross J. Alexander, Esq., then an attorney residing in Belmont county, in a deposition in the following language:

"The children of Mr. Alexander Keys were to receive, in exchange for their interest in this coal, ²⁶¹ property, about twenty-four acres of land, out of what was called the Falke section, being surface, only the coal underlying the same being reserved. The Falke section had been previously purchased, and was then in the name of Selah Chamberlain, trustee. Mr. Keys and his children were to have, and did take, immediate possession of this land. Mr. Keys came very often to see me about this coal, not less than a dozen times, I think, and was very anxious to effect the sale of this coal." Mr. Keys also testified that he entered into the possession of, and had ever since possessed and cultivated, the surface which his children were to receive in exchange for this coal.

The general agent of the defendant testified on this subject as follows:

Cross-examination.

"When he came with Keys you understand that these Keys children were minors? A. Yes, I knew they were minors.

You knew as a business man that Keys could only sell his own interest as an individual? A. I knew that Mr. Alexander was representing to me that he was the father of these children, that after this agreement was consummated he was to be appointed guardian, or act as guardian.

You knew, as a business man, that Mr. Keys as an individual had no right to sell any interest except his own? A. Of course, I knew that.

You knew that, as the father of these children, he had no power to sell their interest? A. Not as their father.

You knew the only legal way it could be done would be to apply to the probate court and get ²⁶² authority from that court to make the sale, and then have a sale made, and have it confirmed by that court, you knew that? A. I thought that was the arrangement made.

You understood that would be necessary? A. Yes, sir.

And without waiting for that you turned over to Mr. Keys as an individual this surface land—twenty-four acres of surface?

A. I do not remember the exact number of acres.

Well, twenty-five perhaps? A. Yes, sir.

And you took possession of the coal, or your company did. You did not wait until the transaction in probate court was completed, did you? A. No, sir.

At that time you went to mining your coal you did not know it had been done? A. I just took Mr. Alexander's and Mr. Keys' word for it, that the title would be perfect.

You understood you were to get a good title through the action of the probate court? A. Yes, sir.

And when you got it then you would convey to him the land?

A. Yes, the titles were to be exchanged.

You did not give him a title to the twenty-five acres of land?

A. Not that I know of.

And you never got a title, you knew that you never had any title for these children's interest? A. I reported to Mr. Chamberlain the transaction and asked to have a deed prepared and signed, but never to my knowledge was it done.

As far as your personal knowledge goes you never at any time had any reason to know this land ²⁶³ had been conveyed to Keys, and you never saw anything that came through the probate court? A. I never give it any further attention.

The other deeds from the other Giffin interests, you had it put on record yourself? A. I do not know whether I had them put on record or whether I had sent them to Mr. Chamberlain and he sent them here.

At any rate you handled the other deeds? A. Yes, they passed through my hands.

You knew all the time you were taking out this coal that no deed for these children's interest had passed through your hands?

A. I knew it had not passed through my hands.

You expected it to come to you because you had handled all the other deeds? A. I was dividing my time so as to attend to

my private business and also to look after that railroad work. There was a good deal of work done in the main office in Cleveland, and it might come without my knowing it.

You expected it, you were dealing with Alexander Keys, and you were general agent of the company? A. Yes, sir.

You expected the deed to be delivered to you? A. Yes, I naturally supposed it would be.

You knew it never came to you? A. I never thought anything more of it.

When you started to mine that coal you knew you did not have a right to do it when you had not got the deed? A. I knew I simply had this arrangement with Keys.

Did you not know as a business man when you started to mine that coal that you did not have a ²⁰⁴ right to do it until you got a conveyance through the probate court, and from a guardian? A. No, I supposed when they had their pay that we had a right to take the coal.

Do you say to the jury that you believed that without making a deed for it, when you turned over this surface land to their father, that you had a right to mine their interests in the coal without first getting a deed from the probate court? Do you say that to the jury? A. I will say that I did not have any doubt but what the deed would be gotten very soon.

Did you not know that would have to be done, and that you had no right to mine it? A. I knew the transaction would not be complete until it was done.

Do you say you did not know you had no right to the coal until that was done? A. No, sir; I did not know that.

Do you say to the jury that you believed that you had a right to take the coal before you had a guardian's deed for it? A. I believed we had a perfect right to take the coal under the land."

Redirect Examination.

"You had paid for the coal by the exchange? A. We gave Mr. Keys that land for the children.

Subsequent to that, did Mr. Alexander say, in pursuance of that arrangement, that he had filed a petition for the purpose of making a legal conveyance? A. He showed me a petition which he said he was going to file.

Already drawn by him? A. Yes, sir."

²⁰⁵ This statement of the evidence is sufficient to show that while, as matter of law, the transaction did not divest the plaintiffs of their ownership of the coal in question, a jury might well have found that it was mined in good faith under a belief that

the purchase would be ultimately completed. If the jury had thus found, by what rule should the damages have been assessed?

The court of common pleas in its charge to the jury laid down the rule applicable upon such finding as follows: If "they acted inadvertently under the honest belief that they were entitled to mine it, and to remove and sell it, and convert it to their own use, then, in that case, the plaintiff will be entitled to recover the value of the coal immediately after the same was severed from the realty, less the cost of making such severance. If the coal when severed and lying on the floor of the mine is to be considered a chattel jointly owned by the plaintiffs and defendant, the rule of damages thus given by the court is as favorable to the defendant as any which the authorities support."

Further still: A very little reflection on the subject will be sufficient to show that the rule as thus stated does not materially differ from one that fixes as the measure of damages the value of the coal in place. For the value of the coal in place is just equal to its value when severed, less the cost of severance. In the very nature of things, the only difference between the value of coal in place and that which lies on the floor of the mine is the cost of hewing it. Therefore, if we can fix its value while in place, then by simply adding the cost of severing it we can ascertain its value when severed. If, on the other hand, any certain rule ²⁰⁰⁸ is shown by which its value when severed and lying on the floor of the mine can be ascertained, then by deducting the cost of severance, we will have its value in place. The real difficulty encountered in this class of cases is in ascertaining the fair value of the coal, or other mineral substance, in place or when severed and lying on the floor of the mine. If, when in place, or on the floor of the mine, it is immediately accessible to a public highway or common carrier, the difficulty is practically overcome, or rather has no existence.

For usually there is no serious impediment met in ascertaining the market value of a commodity that occupies a place in the commerce of the world as important as that filled by fuel coal. And having ascertained its market value, if the coal is so situated with reference to public highways or common carriers that when severed, the means of transportation to that market are open to all persons alike and upon equal terms, its value in place or on the floor of the mine can be ascertained with reasonable certainty. In the case of coal severed and lying on the floor of the mine, its value would be ascertained by deducting from the market price the full cost attending its transportation and mar-

keting, while the value of the coal in place would be the market price less the total expense required to sever, transport, and market it.

The coal of the plaintiffs which was mined by the defendant however, was not thus situated, when the defendant had extended its entry, and laid a track therein, up to the line which divided its other coal from the coal in question; the means of transportation thus afforded was the private way of the defendant, and any coal that passed along or over it would be unloaded or dumped at ²⁶⁷ the defendant's tipple, and pass through or over its screens into the railroad cars in which it was hauled to market. Whether the railroad track on which these cars stood when the screened coal fell into them belonged to the defendant or to a common carrier does not clearly appear. This, however, is not material to the question, for whether this track belonged to the defendant or not, the screens and tipple did, as well as the entry and tramway that led from the tipple to the coal which is the subject of controversy. The means of transportation thus created, being the private property of defendants were available to the plaintiffs only upon the consent of the former. Doubtless the circumstance that this entry had been completed added something to the value of the plaintiffs' coal.

This increased value, it is true, resulted solely from the expenditure thus incurred by the defendant, and rested on the probability that the latter would find it advantageous to its future operations to possess the property, and would therefore desire to purchase it. The strength of this desire and consequent value of the plaintiffs' interest therein would depend to a great extent upon certain conditions of a local character, which are quite apparent to one who is at all familiar with coal mining operations; for instance, if the defendant had exhausted the coal already owned by it which could be removed along this entry, and had coal lying beyond this land to which it wished to penetrate, and which it could only reach by crossing this land, the value of this coal for immediate mining, together with the value of the right to cross this tract of land to its other coal, might be very great to the defendants, and the value of the tract enhanced accordingly; while, on the other hand, if ²⁶⁸ defendant still had coal in abundance that might be mined and transported through this entry, or even other entries owned by it, and could thus continue for a considerable period its mining operations without resorting to this coal, its value may not have been materially enhanced by the construction of the entry. The record discloses

quite clearly that but for this entry the location of the land is such it cannot be deemed to possess any considerable value for mining purposes. The record discloses further that only a year or two before the defendant began to mine this coal it purchased of Elizabeth A. Forsythe an undivided fourth of these premises for seven hundred dollars, of Nancy M. Giffin an undivided one-fourth for the same price, and of James Giffin an undivided one-fourth for six hundred dollars, aggregating two thousand dollars for three-fourths. For the five twenty-eighths owned by the plaintiffs the defendant was to convey twenty-four or twenty-five acres of surface. The value of this surface is not stated, but enough appears in the record to raise a strong inference that it did not exceed five hundred or six hundred dollars. The exact quantity of mineral coal which the land contains is not stated, but it seems to have been about one hundred and fifty acres in all; forty-eight and twenty-nine hundredths acres were mined. Just how great a proportion of the coal should be left to support the roof of the mine does not appear, but certainly not more than one-half of the mineral coal had been removed. And of that removed, five twenty-eighths only, which equals about eight and one-half acres, belonged to plaintiffs, and yet a verdict for nine thousand five hundred dollars was rendered for them, a sum far in excess of the value of the entire ²⁶⁹ tract, but for this entry, and which could not have been awarded to the plaintiffs if the principle of compensation had been kept steadily in view.

If the defendant acted in good faith, and as we have seen the evidence justified a finding that they did so, they should be held to full compensation, but nothing more.

We are not disposed to question the wisdom of applying to cases of this character that severe rule of damages countenanced by the authorities, where bad faith or a willful disregard of the rights of others is shown. In such cases, upon principles of public policy that seek to discourage willful or wanton encroachments on private property, the principle of mere compensation is not followed. The circumstances under which the rule of mere compensation should be disregarded, as well as the rules by which compensation itself may be ascertained, has long occupied the attention of the courts of this country and of England, and the cases where discussions of its several phases may be found are numerous. Among the more important of them may be classed *Martin v. Porter*, 5 Mees. & W. 351; *Morgan v. Powell*, 3 Q. B. 228; *Wild v. Holt*, 9 Mees. & W. 672; *Llynvi v. Brogden*, 11 L. R. Eq. 188; *Jegon v. Vivian*, L. R. 6 Ch. App. 742;

Wood v. Morewood, 3 Ad. & E., N. S., 441; Ecclesiastical Commissioners for England v. Northeastern Ry. Co., 4 Ch. Div. 845; Fothergill v. Phillips, L. R. 6 Ch. 770; Hilton v. Woods, L. R. 4 Eq. 432; In re United Merther Colliery, L. R. 15 Eq. 46; Trotter v. McLean, 13 Ch. Div. 574; Illinois etc. Coal Co. v. Ogle, 82 Ill. 627; 25 Am. Rep. 342; Robertson v. Jones, 71 Ill. 405; Maye v. Yappen, 23 Cal. 306; Goller v. Fett, 30 Cal. 481; Barton Coal Co. v. Cox, 39 Md. 1; 17 Am. Rep. 525; Forsyth v. Wells, 41 Pa. St. 291; 80 Am. Dec. 617; Lyon v. Gormley, 53 Pa. St. 270 261; Waters v. Stevenson, 13 Neb. 157; 29 Am. Rep. 293; Stockbridge Iron Co. v. Cone Iron Works, 102 Mass. 86; Austin v. Huntsville Coal etc. Co., 72 Mo. 535; 37 Am. Rep. 446. Many of the cases on the subject were reviewed by Judge Wright in Railway Co. v. Hutchins, 32 Ohio St. 571; 30 Am. Rep. 629. In that case, however, trespassers had cut timber from the lands of another and converted it into railroad ties and cord wood, and it is quite evident that the means of transporting the ties and cord wood were as available to the owners as to anyone else, so that no difficulty in applying the rule of damages such as occurs in the case before us arose out of the situation and conditions surrounding the timber after severance. There the wood and ties into which the timber had been converted rested on the surface of the earth, was on the land of the owner of the timber and, in the nature of things, could have been reached by teams and hauled to market direct or to the line of a common carrier. For this purpose the construction of elaborate and expensive entries, tramways, and tipples was not necessary. And it is quite apparent that the absence of this necessity enhanced the value of the timber, and that its value, whether as standing trees, felled timber, or manufactured into railroad ties and cord wood, would have steadily diminished in the same ratio that access to it would become difficult, and if situated so as to be practically inaccessible, would possess little or no value whatever. So with the coal lands of the plaintiffs. Before an entry had been extended in their direction, it must be manifest to everyone that their value, owing to their unfavorable situation for the purposes of mining, was comparatively small. Reference has already been made to the effect that may have been produced respecting its 271 value by the defendants extending an entry and tramway from their tipple to the line of this coal. The difficulty of determining this effect, depending as it does upon circumstances the force of which is uncertain, is apparent. In this connection, it may be well to advert to the situation the plaintiffs would be in respect-

ing the coal when severed. To them it was without value except for the probability that defendants would remove it. They could not themselves transport it, or their share of it, over the defendant's tramway, nor could they reach it by an independent entry, even if that had been in its nature practicable, because the defendants owned twenty-three twenty-eighths of the land through which the entry must have been extended. These considerations show the impracticability of attaining the ends of justice by applying a technical rule of damages to the circumstances of this case. The supreme court commission refused to apply a rule of that character to the circumstances shown in *Railway Co. v. Hutchins*, 32 Ohio St. 571; 30 Am. Rep. 629. The right of property in the ties and cord wood which were the subject of that action while they remained on land where cut or made was in the owner of the timber. By a well-established principle, the trespassers who felled the trees, and by their labor turned them into cord wood and railroad ties, did not by these unlawful acts transfer the property therein to themselves. The wood and ties remained the property of the owner of the timber, and he could have gone upon his land and hauled them to market, sold them and retained the proceeds. Still further, if he could have identified them after they had been sold and delivered to the railroad company, he could have reclaimed them in specie if he ²⁷² had desired to do so. This he could do because they were his, and he could not be deprived of his property in them without his consent. The railway, by taking and using them, converted them to its own use without his consent. This constitutes trover, and by the well-established rules of law, the measure of damages is the value of the property. If these well-settled rules of law had been technically applied in that case, the measure of damages would have been at least the value of the ties and wood when converted to its use by the railroad company. The court there, however, paid more regard to the principle of just compensation than to those technical rules which the owner of the wood and ties sought to have applied; and instead of allowing him, in accordance with those technical rules, the value of those articles at the time of conversion, limited his compensation to value of the timber as it lay upon the earth immediately after being felled. The principle that underlies this case and those cases which support its conclusions, and upon which all of them rest, is that of fully compensating one who has suffered injury to his property, without doing injustice to others. This case was again before this court in 37 Ohio St., page

282, and, beginning on page 292, McIlvaine, J., says: "As we understand the rule laid down by the commission, the value of the timber, as enhanced by the labor of cutting down, was the true measure of damages. And surely, as the labor of felling the trees was a trespass on the real estate of the plaintiff, who has waived the wrong done to his realty, such labor was not an accession to the value of his personal property, which the trees first became after they were cut down and severed from the land. The value at least of the property after it ²⁷³ became personal was the measure of the injury complained of by the plaintiff."

This rule, when applied to the circumstances of that case, is reasonable; the mere felling of the trees did not require any appliance beyond an ax, and was an inconsiderable proportion of the labor necessary to convert the timber into either cord wood or railroad ties, and did not extend beyond compensating the plaintiff for his timber and the trespass which seems to have been willful, which had waived, to his real estate.

Judge McIlvaine, in the course of the opinion, says further, on page 294: "Indeed, it appears to me to be axiomatic that between man and man, where no wrong was intended, equal and exact justice is done when the party wronged is made whole for all that he has lost by reason of being deprived of his property."

If this principle had been pursued in ascertaining the damages suffered by the plaintiffs on account of the coal mined and removed by the defendant, a verdict many times greater in amount than the value of the entire coal in place could not have been rendered.

This result could have been accomplished only in one of two ways: 1. Either by applying to the case some technical rule of damages, which, though usually applicable to actions of this class, and generally with just results, was in fact inapplicable here by reason of some particular circumstance that distinguished it from its class; or 2. By a misconception of the principles by which the market value of the coal should have been ascertained.

The court, in its instructions to the jury, regarded the coal as a chattel from the instant of severance, ²⁷⁴ and authorized the jury to find its market value there, as if no restrictions whatever in respect of its removal existed. It said to the jury that if the defendants acted "inadvertently under the honest belief that they were entitled to mine it [the coal] and remove and sell it, and convert it to their own use, then, in that case, the plaintiffs will be entitled to recover the value of the coal immediately after

the same was severed from the realty less the cost of severance."

It also instructed the jury that "In considering the case in this view, gentlemen, you are not to consider how much it would cost the plaintiffs to have mined the coal, under the circumstances, where it laid; but how much did it cost the defendant to mine it under the circumstances as you may find them from the testimony." And refused to give to the jury each of the following instructions which the defendant requested, to which refusal defendant excepted:

1. If you find from the evidence that the only place where the vein of coal in question in this case outcrops is at the northwest corner thereof, and you find from the evidence that it is impracticable or expensive to mine and remove the coal by an opening at such place, these facts must be considered as affecting the value of the coal.

2. If you find from the evidence that the defendant mined the coal, believing in good faith it owned it, and that it had reasonable grounds for such belief, and that the defendant had no notice or knowledge of any claim or interest of the plaintiffs, or any of them therein, then the plaintiffs will be entitled to recover the value of the coal in place before it was disturbed.

275 3. The value of the coal in place, or on the floor of the room, is its market value there, exclusive of the facilities and conveniences afforded by defendant's passageways, tracks, cars, triples, and other fixtures, in removing it.

It is perfectly clear that when the entry and tramway constructed by defendant was extended up to and touched the line of the coal in question, no right to use these means of transportation accrued to the plaintiffs below. True the entry and tramway were there, and that circumstance, as before shown, may have tended to enhance the value of the coal in place, not, however, because the plaintiffs had a right to use them, but because the defendant might want the coal. If the plaintiffs, while their coal was in place, had no right to the use of the facilities for transportation thus belonging to the defendants, how can it be said that such right would accrue to them in case the defendant in good faith, supposing it had bought the coal, should sever a portion of it? We think such right would not accrue under those circumstances. If not, then the coal thus situated and considered as a chattel would possess little if any value. Reference to these considerations has been made because they afford an additional illustration of the difficulties that follow an attempt to adjust the rights of these parties by applying to the

facts of the case technical rules respecting the measure of damages. Treat the coal as a chattel, hold the acts of the defendants to constitute a conversion of it, and assess the damages as though the owners before and at the moment of its conversion had an unrestricted right to transport it to market, although in fact it was totally inaccessible ²⁷⁶ to them. The verdict in this case shows the injustice that may be thus produced.

The only rational course to pursue in such a case as this, where the defendant is a joint owner of the coal in place with the plaintiff, and acts upon the bona fide belief that he has acquired by purchase the interest of his cotenant, and has mined it or a portion of it, is to ascertain the full value of the coal in place at the time it was mined. The severing, removing, screening, and marketing the coal should be treated as one continued transaction, and the defendant charged with its value at the time he began to mine it. This must be determined by considerations, some of which are quite obvious; as, for instance, quality of the coal, the thickness of the vein or veins, if more than one, its situation with reference to existing facilities, natural or artificial, for mining and marketing it. Doubtless other circumstances exist that bear more or less strongly on the question of value in place; but among them should not be classed the necessity, if any exists, that the defendants may be under to use these lands, after the coal has been exhausted, in its future operations, for a right to such use of the land would not accrue to defendant upon the exhaustion of the coal but by purchase only.

In *Hilton v. Wood*, L. R. 4 Eq. 432, the value of the coal in place was made the measure of damages against a defendant who had mined it under a belief he was its owner. He had bought of one who had no title, and, having mined a part of it, an action was brought against him by its owner to restrain further mining, and for an account of the coal already mined. The syllabus reads: "In assessing compensation for coal already gotten by ²⁷⁷ the defendant, the court being of opinion that he had worked it inadvertently, and not fraudulently, held that he was only to pay the fair value of such coal as if he had purchased the mine from the plaintiff." This rule was applied by Parke, B., in *Wood v. Morewood*, 3 Ad. & E., 440. The coal in that case had been mined by the defendant under a claim of title that was held invalid in an action to recover its value. Parke, B., "told the jury that if they found for the plaintiff, they were to determine what damages should be given; that if there was fraud or negligence on the part of the defendant, they might give, as

damages under the count for trover, the value of the coals at the time they became chattels, on the principle laid down in *Martin v. Porter*, 5 Mees. & W. 351, but, if they thought the defendant was not guilty of fraud or negligence, but acted fairly and honestly in the full belief that he had right to do what he did, they might give the fair value of the coals as if the coal fields had been purchased from plaintiff. The jury adopted the latter estimate, and found for plaintiff, damages two hundred and ten pounds per acre." This rule of damages, in substance, was applied in *Jegon v. Vivian*, L. R. Ch. App. 742.

We cannot say that the court of common pleas erred in saying to the jury that the value of the coal when severed less the cost of severance would be the measure of damages, in case it found the defendant had acted in good faith, because there is in substance no difference between the rule as thus stated and a rule which would fix the measure of damages at the value of the coal in place, for the very simple and obvious reason that the value of the coal in place is just equal to its value when severed less the cost of severance. The statement ²⁷⁸ of the rule as given by the court doubtless was a principal cause which led the jury to find the excessive verdict rendered by it. Because it was not accompanied by sufficient qualification, the jury was suffered to enter the field of conjecture and speculation without any certain guides by aid of which its conclusions should be reached.

Instead of saying to the jury that, "in considering the case in this view, gentlemen, you are not to consider how much it would cost the plaintiffs to have mined the coal under the circumstances, where it laid; but how much did it cost the defendant to mine it under the circumstances as you may find them from the testimony," the court should have said that the difficulties attending its mining and transportation by the plaintiffs might be very material in fixing its value. If the principle of compensating them was to be followed, if they were to be given the value of what they had lost, a consideration of all the conditions that surrounded their property and tending to affect its value was material. In this connection and for the foregoing reasons the request No. 1 should have been given. It reads: "If you find from the evidence that the only place where the vein of coal in question in this case outcrops is at the northwest corner thereof, and you find from the evidence that it is impracticable or expensive to mine and remove the coal by an opening at such place, these facts must be considered as affecting the value of the coal."

In the nature of things, the value of the coal would be affected:

by the circumstances recited in this proposition. The second of the three propositions before referred to, which the court refused to give to the jury, prescribed the rule of damages ²⁷⁹ if the defendants acted in good faith, at "the value of the coal in place before it was disturbed." This rule as already shown did not differ in substance from that given, but it was much easier applied to the circumstances of the case than the one given, where compensation is the end in view, and we think the defendant was entitled to have the question of damages considered from that point of view, and that the verdict was materially affected by the refusal of the court to instruct the jury according to the principle there announced.

The last of the three propositions above noted which the court declined to give, relates to the conveniences afforded by the entry, tramway, et cetera, constructed by defendants for mining and removing the coal. The propositions denied to the jury the right to consider these facilities and conveniences at all in fixing the damages. This proposition is too broad; for to the limited extent already adverted to which these facilities and conveniences might enhance the general value of the coal, they should be considered. The purpose to be kept in view is that of compensating the plaintiffs for all they have lost, and that compensation should be full, for without their consent their property has been taken. And to accomplish that purpose every circumstance that may tend to increase its value should be regarded as material.

Judgment affirmed.

Williams and Marshall, JJ., dissent.

COTENANCY IN MINING PROPERTIES—LIABILITY OF COTENANT EXCLUSIVELY OPERATING PROPERTY.—As between tenants in common of an opened and developed slate quarry the compensation which the tenant out of possession is entitled to receive from the tenant in possession taking out slate is to be measured by the market value of the slate in place, or in a state of nature: Appeal of Fulmer, 128 Pa. St. 24; 15 Am. St. Rep. 662, and note. In the case of a tenancy in common of lead mines, in settling the accounts of the occupying and operating tenants, each should be charged with all his receipts and credited with all his expenses, including those for necessary improvements, on account of the operation of the mine: Graham v. Pierce, 19 Gratt. 28; 100 Am. Dec. 658. In the allowance for improvements, the element of good faith on the part of the occupying tenant should be considered: Ruffner v. Lewis, 7 Leigh, 720; 30 Am. Dec. 513. Compare Foster v. Weaver, 118 Pa. St. 42; 4 Am. St. Rep. 573, where the common property was an oil leasehold; Williamson v. Jones 43 W. Va. 562; 64 Am. St. Rep. 891; Huff v. McDonald, 22 Ga. 131; 68 Am. Dec. 487, where the property was a gold mine; monographic note to Early v. Friend, 78 Am. Dec. 665-668.

STATE v. JOHNSON.

[58 OHIO STATE, 417.]

MAYHEM AND MAIM ARE EQUIVALENT WORDS and mean the privation of the use of a limb or member of the body, by which one is rendered unable to defend himself or annoy his adversary. Hence, the biting of an ear does not constitute a maiming.

MAYHEM—INDICTMENT.—The malicious biting by one of the ear of another cannot be charged in an indictment as done with intent to maim, as biting of an ear does not constitute mayhem.

MAYHEM—INDICTMENT—VARIANCE.—The unlawful biting of an ear, with intent to disfigure, is not an offense inferior to that of biting it with an intent to maim under the statute. An indictment charging the biting to have been done with intent to maim is not supported by evidence of biting with an intent to disfigure. In such case, there is a material variance between the proof and the allegation.

MAYHEM—INDICTMENT—CONVICTION OF INFERIOR OFFENSE.—Under an indictment charging the malicious biting by one of the ear of another, with intent to maim, the accused may be properly convicted and punished for the inferior offense of aggravated assault and battery.

T. B. Williams, prosecuting attorney, for the plaintiff in error.

M. H. Donahue, for the defendant in error.

⁴²²² **MINSHALL, J.** David Johnson was prosecuted on an indictment presented by the grand jury of the county, framed on the provisions of section 6819 of the Revised Statutes. The section, so far as it is applicable to this case, is as follows: "Whoever, with malicious intent to maim, or disfigure, cuts, bites, or slits the nose, ear, or lip, cuts or disables the tongue, puts out or destroys an eye, cuts off or ⁴²²³ disables a limb or any member of another person," is declared guilty of an offense punishable by imprisonment in the penitentiary. The indictment contained two counts. In the first it was charged that he maliciously "did bite the ear of one Reuben Mitchell with intent to disfigure," and, in the second, that he maliciously "did bite the ear of one Reuben Mitchell with intent to maim." A demurrer was sustained to the second count, and, on a plea of not guilty, he was acquitted on the first count. The prosecuting attorney took a bill of exceptions to the ruling on the demurrer to the second count, and prosecutes the same here under the provisions of the statute in that regard, to test the accuracy of the ruling.

The demurrer presents the question whether the malicious biting of the ear of another can be charged as done with intent to maim.

There is no question, we think, but that "maim" as a noun, and "mayhem" are equivalent words, or that maim is but a newer form of the word "mayhem"—the difference being in the orthography and not in the sense: Webster's Unabridged Dictionary, "Maim," as a noun, is there defined the same as mayhem: "The privation of the use of a limb or member of the body by which one is rendered unable to defend himself or to annoy his adversary." This is the definition of mayhem at common law: 1 East's Pleas of the Crown, 393; 1 Wharton's Criminal Law, sec. 581. Hence the verb "to maim" is accurately defined in Anderson's Law Dictionary as follows: "To commit mayhem." So, at common law, whatever the injury to any member of the body might be, if it did not permanently affect the physical ability of the person to defend himself or annoy his adversary, it did not amount to mayhem. Neither ⁴²⁴ the biting of an ear nor the slitting of the nose was regarded as an injury of this character: Clark's Criminal Law, 182; 3 Blackstone's Commentaries, 121. The outrage upon Sir John Coventry, who had been set upon in the street and his nose slit, for words spoken in parliament, led to the adoption of what is known as the Coventry act, 22 & 23 Charles II. This act made it a felony without benefit of clergy, where anyone unlawfully cut out or disabled the tongue, put out an eye, slit the nose, cut off a nose or lip, or cut off or disabled any limb or member of any other person, with intent to maim or disfigure him: 4 Blackstone's Commentaries, 206. Our statute is substantially the same. Any of the injuries there named, done with intent "to maim or disfigure" is punishable by imprisonment in the penitentiary. Whether it be the biting of an ear, or the putting out of an eye, or the cutting off of a hand, each is alike regarded as a crime and punished the same way; or, in other words, each is of the same degree of criminality: Rev. Stats., sec. 7316.

The question in the case is, whether the second count in the indictment charges an offense against the laws of the state. It does not for reasons stated charge a maiming. Then does it charge the offense of biting the ear with intent to disfigure? Such intent is not averred in the count; and, unless the intent to maim includes the intent to disfigure, there can be no conviction on the second count for such an offense. Evidence of an intention to disfigure would be a fatal variance from the intent laid in the count. The intent in this case must depend upon the nature of the injury, in connection with the character of the member on which it is inflicted. ⁴²⁵ If the member is not one of

use to the person in defending himself, an injury to it cannot be said to have been done with intent to maim. It is provided, among other things, in section 7316 of the Revised Statutes that: "When the indictment charges an offense including different degrees, the jury may find the defendant not guilty of the degree charged and guilty of an inferior degree." In *Barber v. State*, 39 Ohio St. 660, it was held that the offense of cutting with intent to kill, and that of cutting with intent to wound, are offenses of the same degree, under the provisions of section 6820 of the Revised Statutes, making it an offense for any one to cut another person "with intent to kill, wound, or maim." The indictment charged a cutting with intent to kill; the verdict of the jury was "guilty of cutting with intent to wound." The court held that the indictment was not supported by the verdict, for the reason that the offense of cutting with intent to wound is not an offense inferior in degree to that of cutting with intent to kill. By a parity of reasoning, it follows that the unlawful biting of the ear with intent to disfigure is not an offense inferior to that of biting it with intent to maim; and an indictment charging the biting to have been done with intent to maim, would not be supported by evidence of an intent to disfigure—there would in such case, be a material variance between the proof and the allegation.

But this does not exhaust the inquiry, for the question remains, Does the count charge any offense against the laws of the state; if so, the court erred in sustaining a demurrer to it. Now, it seems apparent that the malicious biting of the ear of another, whether to maim or disfigure, amounts ⁴²⁶ to an assault and battery—an offense inferior in degree to an assault with intent to maim or disfigure—the offense charged being simply an aggravated form of assault and battery of which the defendant could have been convicted on the count demurred to, on proof of such an offense: *Heller v. State*, 23 Ohio St. 582; *Barber v. State*, 39 Ohio St. 660; 3 Blackstone's Commentaries, 121.

For this reason the court erred in sustaining a demurrer to it.
Exceptions sustained.

Mayhem.

Mayhem, under the rule of the common law, is the act of unlawfully and violently depriving another of the use of one or more of the members of his body, rendering him less able, in fighting, either to defend himself or to annoy his adversary. Therefore, the cutting off, or disabling, or weakening the hand or finger of another, or striking out an eye or a foretooth, or a deprivation of those parts

the loss of which in all animals abates their courage, is mayhem; but the cutting off of an ear, or the nose, or the like, is not mayhem at the common law, because they do not weaken but only disfigure the body: 3 Blackstone's Commentaries, 121; 4 Blackstone's Commentaries, 205; 1 East's Pleas of the Crown, 393.

Both the English and American statutes of the greater number of the states of the United States have greatly enlarged the scope of the offense or crime of mayhem, which now generally includes all malicious injuries which disable or disfigure the person. Although the statutes of the different states are not uniform, the above rule will be found to apply under nearly all of them, without regard to the particular manner in which the injury is inflicted, whether by stabbing, cutting, shooting, biting, striking or gouging: *United States v. Scroggins*, 1 Hemp. 478; *Baker v. State*, 4 Ark. 56.

It may be noticed in passing that the word "maim" or "maiming" is used in the statutes synonymously with the word "mayhem." When the statute speaks of disabling or disfigurement of a limb or a member of the body as a maiming, a permanent injury is contemplated such as at common law would constitute a mayhem. Hence, a temporary disabling of a finger, an arm, or an eye is not sufficient to constitute the statutory offense: *State v. Briley*, 8 Port. 472. The contrary rule was, however, maintained in *Slatterly v. State*, 41 Tex. 619, where it was held that the loss of a member of the body through the willful act of another to such an extent as to substantially deprive him of it at the time of the injury was mayhem, though such member was put back in its proper place and afterward grew there. In this case it was held to constitute mayhem to bite off a portion of the under lip of another.

It was held in *United States v. Askins*, 4 Cranch C. C. 98, that under a statute making it a felony to unlawfully cut out or disable the tongue, put out an eye, slit a nose, bite or cut off a nose or lip, or cut off or disable any limb or member of any person, with intent to maim or disfigure, an ear could not be disabled within the meaning of the statute, and was not intended to be included thereby. The rule as laid down in this case is, we think, opposed to reason, and it certainly is not upheld by the authorities generally, which hold, under similar statutes, that the biting off of a human ear is mayhem or a maiming, according as the word is used in the statute: *Molette v. State*, 49 Ala. 18; *People v. Golden*, 62 Cal. 542; *State v. Conahan*, 10 Wash. 268; *State v. Skidmore*, 87 N. C. 509.

It seems that in order to constitute the crime of maiming or mayhem by biting of or off of a human ear, it must be shown that a sufficient portion of the ear was maliciously severed from the body of the injured person by the accused to attract observation and impair comeliness: *State v. Harrison*, 30 La. Ann. 1329. A biting off of a small portion of the ear, which does not disfigure the person, and can only be discovered upon close inspection or examination, when attention is directed to it, is not mayhem under such statutes: *State v. Abram*, 10 Ala. 928. But the offense may be committed without the entire severance or mutilation of the ear. It is sufficient if part only is severed, provided such part is not merely the outside

skin, and is so large as to make it perceptible to anyone that part of the ear is gone: *State v. Girkin*, 1 Ired. 121.

The biting, slitting, or tearing off of the nose of a human being with intent to disfigure him is mayhem: *State v. Jones*, 70 Iowa, 505.

To deprive one of his front tooth, unlawfully and maliciously, is to maim him within the meaning of the Texas statute: *High v. State*, 26 Tex. App. 545; 8 Am. St. Rep. 488.

Biting off the end of a thumb of another may be a maiming, but biting off a portion of a member of a person's body is not necessarily a maiming. In such cases, it should be left to the jury to determine whether or not the injury inflicted is such as substantially deprives the injured person of the member: *Bowers v. State*, 24 Tex. App. 542; 5 Am. St. Rep. 901.

The willful and malicious shooting off of the toe of another may constitute maiming: *Davis v. State*, 22 Tex. App. 45.

Putting out the eye of one by another is maiming or mayhem, if the act is done willfully and maliciously with intent to maim: *Chick v. State*, 7 Humph. 161.

Under a statute making it mayhem to cut off the organs of generation of another, a master may be indicted and convicted of that crime for the castration of his own slave: *Werley v. State*, 11 Humph. 171.

Under a statute making it mayhem to maliciously and willfully injure, wound, or disfigure the private parts of another with intention to maim or disfigure the person injured, although such wounding or disfigurement does not amount to castration, a willful and malicious injury inflicted upon the private parts of a female with intent to disfigure them is mayhem: *Kitchens v. Georgia*, 80 Ga. 810; *Moore v. State*, 4 Chand. 168. In the latter case, it was held that it must have been the intent of the statute to give the same protection to the internal private organs of the female that it did to the external organs of the male: *Moore v. State*, 4 Chand. 170; and in *Kitchens v. State*, 80 Ga. 811, it was very appropriately said that "the question is, whether the private parts of females are protected against wounding or disfigurement, or whether the protection extends only to males. The military or combative importance of the organ or member injured or destroyed, to which the old common law had special regard, is of no significance whatever as a constituent of mayhem under our code. Whether capacity for attack or defense has been lessened by the maiming is utterly irrelevant and immaterial. The code looks not to the fighting, to giving or shunning blows, but to maintaining the integrity of the person, the natural completeness and comeliness of the human members and organs, and the preservation of their functions." He who destroys either of these, with intent, willfully and maliciously, either to maim or disfigure another, is guilty of mayhem: *Kitchens v. State*, 80 Ga. 812. The same may be said of all the statutes of the different states which make it a crime for one person to willfully and maliciously injure or deprive another of a member of his body, with intent to maim or disfigure him.

Intent.—To constitute the crime of maiming or mayhem, the act must be done both willfully and maliciously. In such case a willful act is one committed with an evil intent, without reasonable ground for believing it to be lawful, and without legal justification. A malicious act is one done in a state of mind which shows a heart regardless of social duty, and fatally bent on mischief; a wrongful act intentionally done without legal justification or excuse: *Bowers v. State*, 24 Tex. App. 542; 5 Am. St. Rep. 901.

While an act, to constitute mayhem, must be done willfully and maliciously, it is not necessary that it shall be done premeditatedly, as malice aforethought is not an essential element of the crime, and proof of premeditation or deliberation is not required: *People v. Wright*, 93 Cal. 564; *State v. Simmons*, 3 Ala. 497; *Terrill v. State*, 86 Tenn. 523; *State v. Skidmore*, 87 N. C. 509; *State v. Crawford*, 2 Dev. 425; *State v. Girkin*, 1 Ired. 121; *Hayden v. State*, 4 Blackf. 546; *Molette v. State*, 49 Ala. 18. The intent required by the statutes to constitute the crime of mayhem may be defined to be a purpose at the time to do, without lawful authority or necessity, that which the statute forbids: *State v. Hair*, 37 Minn. 351. Under a statute against malicious mayhem, it is not necessary to prove premeditated design in order to convict, and a request to charge that to constitute the crime the act must have been done by the accused with a premeditated design or intention is properly refused: *United States v. Gunther*, 5 Dak. 234.

To support an indictment for mayhem for putting out an eye of another, it is not necessary, where the act is done in a sudden conflict, that the defendant should have formed the design previous thereto in order to constitute the crime. It is sufficient if he maliciously and intentionally does the act in pursuance of a design formed during the conflict: *State v. Simmons*, 3 Ala. 497. Under an indictment for disfiguring the person of another during a sudden conflict, it is not necessary to constitute the crime that the accused had formed a premeditated design to inflict the injury: *State v. Jones*, 70 Iowa, 505.

The New York statute defining mayhem especially makes a "premeditated design" an essential element of the crime, and under such statute such design must be pleaded and proved, and cannot be inferred from the commission of the act itself alone. Hence, if the act is done in a sudden affray, the case is not brought within the statute, without proof of premeditation: *Godfrey v. People*, 63 N. Y. 207; *Tully v. People*, 67 N. Y. 15. The same rule prevails in Oregon: *State v. Cody*, 18 Or. 506.

Although under statutes relating to mayhem and maiming the injury must be willfully inflicted with intent to maim, "injure, disfigure, or disable," the intent is to be presumed from the fact of injury or act of maiming, unless the contrary appears: *State v. Crawford*, 2 Dev. 425; *State v. Evans*, 1 Hayw. 325; *State v. Girkin*, 1 Ired. 121; *State v. Hair*, 37 Minn. 351. The fact being unlawful in itself, a malicious intent is presumed therefrom: *Baker v. State*, 4 Ark. 56; *Werley v. State*, 11 Humph. 171.

If one person disfigures another in the midst of an altercation, a

specific intent on the part of the defendant to disfigure is an essential element of the crime; but such intent may be inferred or presumed if he did the act deliberately and the disfigurement was reasonably to be apprehended as the natural and probable consequence of the act: *State v. Jones*, 70 Iowa, 505; *High v. State*, 28 Tex. App. 545; 8 Am. St. Rep. 488; *Ridenour v. State*, 38 Ohio St. 272. Under the Tennessee statute relating to mayhem a specific intent or purpose to maim or disfigure is not an essential element of the crime: *Terrill v. State*, 86 Tenn. 523.

Indictment.—In general, it may be said that while it is not absolutely necessary to employ the exact words of the statute, it is well settled that the offense as to the facts and circumstances must be brought within the provisions and limitations of the statute creating it, either by the terms employed in the act or others clearly and necessarily equivalent: *Commonwealth v. Clark*, 6 Gratt. 675-681; *Tully v. People*, 67 N. Y. 15. The indictment must state that the act constituting the crime was done willfully, intentionally, and maliciously: *State v. Ormond*, 1 Dev. & B. 119. An indictment charging the crime of maiming in the words of the statute is sufficient, though it fails to allege that the injured party was maimed: *Guest v. State*, 19 Ark. 405; *Kitchens v. State*, 80 Ga. 810; *State v. Absence*, 4 Port. 397. It has been held, however, that an indictment for maiming must also charge that the injured party was maimed by the act alleged: *Chick v. State*, 7 Humph. 161; *Commonwealth v. Lester*, 2 Va. Cas. 198. An indictment for mayhem or maiming need not charge the offense to have been committed feloniously, for if it charges it to have been done willfully and maliciously it is sufficient: *State v. Absence*, 4 Port. 397; *Davis v. State*, 22 Tex. App. 45. In *State v. Vowels*, 4 Or. 325, it was held that any offense made punishable by statute and in its nature similar to the common-law crime of mayhem, might, in an indictment therefor, be denominated mayhem, although that specific word was not used in the statute. An indictment for mayhem, which charges in one count that the defendant did "slit, cut off, and bite off an ear," is not bad for duplicity: *State v. Alley*, 3 Heisk. 8. Nor need the indictment state whether it was the right or the left ear: *State v. Green*, 7 Ired. 39. If the statute affixes a penalty when an act is done with intent to maim, disfigure, or disable, in the disjunctive, the indictment therefor should charge the intents conjunctively, and the proof of either will support the indictment: *Angel v. Commonwealth*, 2 Va. Cas. 231. An indictment for mayhem charging that the accused "destroyed" the thumb of the prosecutor is not defective as failing to use the statutory word "disabled," and is supported by proof that the thumb was disabled: *Tully v. People*, 67 N. Y. 15.

MARKLEY v. MINERAL CITY.

[58 OHIO STATE, 420.]

MUNICIPAL CORPORATIONS—POWER TO ACQUIRE LAND FOR DONATION PURPOSES.—A municipal corporation has no power, by deed of purchase, to legally acquire title to, and hold real estate for, the sole purpose and with the sole intent of donating it to persons or corporations to procure the construction and operation of manufacturing plants within the municipality.

MUNICIPAL CORPORATIONS HAVE SUCH CAPACITIES and powers, and such only, as are expressly granted, and such as may be implied as essential to carry into effect those expressly granted. All doubtful claims to power are resolved against the corporation.

MUNICIPAL CORPORATIONS—POWER TO ACQUIRE LAND FOR DONATION PURPOSES.—If a municipality pays out its corporate funds for the purchase of land to be donated by it to a person or corporation as an inducement to build and operate manufacturing plants within the corporate limits, the money is unlawfully expended, and the deed taken by the city purporting to convey such land is void.

MUNICIPAL CORPORATIONS—POWER TO ACQUIRE LAND FOR DONATION PURPOSES—RIGHT TO RECONVEYANCE.—If a municipality has purchased lands with its corporate funds, and has donated it to a person as an inducement for him to construct and operate manufacturing plants within the municipality, it is not entitled to maintain an action in a court of equity to compel a reconveyance of the land to it with possession, together with a cancellation of its own conveyance. In such case, the court will not aid either party, but will leave them where they have placed themselves.

EQUITY.—PARTIES IN PARI DELICTO are not entitled to relief in equity. The court must refuse to aid either, and must leave them where by their illegal acts they have placed themselves.

The village of Mineral City purchased three acres of land in fee and paid therefor out of the corporate funds of such municipality. It purchased this land for the sole purpose of donating it to some person or corporation as an inducement to construct and operate manufacturing plants within the corporate limits. It conveyed the land to one Markley as a pure donation, to procure him to construct and operate such plants in accordance with an agreement to that effect entered into between the parties. Markley took possession, but failed to keep his agreement, and the city brought this action to obtain a decree setting aside its conveyance to Markley, to require a reconveyance from him, and for possession of the property. Judgment for the plaintiff, and Markley appealed.

A. W. Patrick and Neeley & Patrick, for the plaintiff in error.

E. S. Soners, for the defendant in error.

⁴³⁷ SPEAR, C. J. The pleadings and findings of fact present this question: Had the village power, by deed of purchase, to legally acquire title to and hold real estate for the sole purpose and with the sole intent of donating the same to procure the construction and operation of manufacturing plants within its limits?

⁴³⁸ Two sections of the constitution seem to bear upon the subject. One, section 6 of article 13, makes it the duty of the general assembly, in providing for the organization of municipalities, to restrict their power of contracting debts, and loaning their credit, so as to prevent the abuse of such power. The other, section 6 of article 8, expressly denies to the assembly power to authorize any such corporation to become a stockholder in any joint stock company, corporation, or association whatever, or to raise money for, or loan its credit to, or in aid of, any such company, corporation, or association. And that this interdict applies as well to the case of an individual as to the aggregations named is without question. It is intended to prevent the union of public and private capital in any enterprise whatever.

In considering the attitude of the village in this controversy, we must look at the entire scheme that was proposed to be accomplished. The first step was to pay out money of the municipality in the purchase of land. The next was a donation of the land so acquired to some one willing to contract, and that person, in turn, to construct and operate the manufacturing plants for the proposed benefit of the people. The village was not to share as a partner in the enterprise, nor to loan its credit for that purpose, nor did it do so; but it did propose, by the wrongful use of corporate funds, to make a purchase, intending thereafter to make a gift of the property so to be acquired, both of which things it undertook to do. It cannot be doubted that the scheme taken as a whole was clearly violative of the spirit of the sections of the constitution cited. And, notwithstanding this, the proposition of the village is, that a court of ⁴³⁹ equity should aid it in recovering that which it has undertaken to acquire by a scheme forbidden by law, and has parted with in compliance with a contract which it had no power to make.

It is to be borne in mind that we are dealing with the status and capacity, not of a natural person, but of a corporate one, a mere creature of the law, an artificial entity which, having no natural rights or powers, exists and operates only by virtue of the law of its creation. And we suppose it to be settled that our municipalities have such capacities and powers, and such only,

as are expressly granted, and such as may be implied as essential to carry into effect those which are expressly granted, and that doubtful claims to power are resolved against the corporation: Cooley's Constitutional Limitations, 231, 232; *Minturn v. Larue*, 23 How. 435; *St. Louis v. Bell Teleph. Co.*, 96 Mo. 623; 9 Am. St. Rep. 370; 1 Dillon on Municipal Corporations, secs. 89, 457; 2 Dillon on Municipal Corporations, sec. 936; *Ravenna v. Pennsylvania Co.*, 45 Ohio St. 118. So that the question resolves itself into this: Has the power been clearly granted to villages to accept title to land for the express purpose of donating it for the encouragement of local improvements? If not, is such power to be applied as essential to carry into effect other clearly granted powers?

The right of a municipality to acquire property is given by paragraph 33 of section 1692 of the Revised Statutes, in these words: "To acquire by purchase, or otherwise, and to hold real estate, or any interest therein, . . . for the use of the corporation, and to sell or lease the same." Here is specific mention of the purposes for which land may be acquired. The controlling idea is that the property must be for the use of the corporation. ⁴⁴⁰ This idea of use implies power to hold; it implies, beyond this a *jus disponendi*, a power to deal with the property. If such power does not exist, then its attempted acquisition would be an idle performance. The two ideas are inseparable; if the municipality is without power to hold and dispose of the property, then, by the same token, it is without power to acquire. And we are necessarily confined, in treating of the purpose of acquisition, to the express purpose, viz: "The use of the corporation," for, applying the maxim, *Expressio unius est exclusio alterius*, all other purposes are excluded. It would follow, therefore, that if the land be for the use of the municipality, for some legitimate corporate purpose, then power is given by the clause quoted to acquire it, and necessarily power to hold and dispose of it. But if it be not for the use of the corporation, that is, for a use to which the corporation may lawfully devote it, then this clause gives no capacity to receive or power to hold. Another paragraph of the same section gives power to accept bequests, but that is not involved here, and, so far as we are aware, there is no general power given to acquire real estate except by the paragraph quoted. Not only, therefore, is there no clear expression of a purpose to give power to acquire and hold real estate for speculative purposes, but the provisions upon the subject, statutory and constitutional, clearly establish that no such

power is intended. The chief function of a municipality being to regulate local governmental affairs because they may be dealt with better by the people interested than by a distant central power, we cannot assume a purpose to invest such corporation with the powers or capacities of individuals, or of private corporations, ⁴⁴¹ for objects not pertaining to municipal rule, since that would be to pervert the institution from its legitimate ends, and to require of it duties which it is not adapted satisfactorily to execute, and which are not necessary to enable it to discharge the appropriate functions and duties of local administration. It follows that no such power is to be implied as essential to carry into effect the power which is in terms given.

If we are right in these conclusions, then it results that the attempted purchase by the village of the Lechner heirs, gave to the municipality no title to the land, either legal or equitable.

This being the situation, how does it leave the parties? Markley is in possession. The attempted deed of the village gave him no title, but, on the other hand, the village has no title to be restored. It cannot prevail except through the medium and with the aid of the illegal transaction to which it was a party, and hence it can have no standing in a court of equity, because it asks affirmative relief under circumstances showing that it is itself in the wrong. The defendant is equally in *pari delicto*. The court will, therefore, refuse aid to either, but leave them where, by their legal acts, they have placed themselves: *Thomas v. Cronise*, 16 Ohio, 54; *State v. Buttles*, 3 Ohio St., 309; *Commissioners v. Andrews*, 18 Ohio St. 49; *Board of Education v. Thompson*, 33 Ohio St. 321; *Kahn v. Walton*, 46 Ohio St. 195.

It is insisted that Markley having taken a deed from the village, is estopped to deny the title of his grantor. But Markley does not attempt to stand on that title. He distinctly repudiates it. But if he did, the contract which the plaintiff itself ⁴⁴² pleads, and the finding of the circuit court, disclose fully the illegal character of the transaction.

Attention is called to section 21 of the Revised Statutes, and the proposition is advanced that the attempt of the village to convey to Markley may be treated as an illegal loan or deposit of the property of the village, which, by this section, it is authorized to recover back. The section cannot apply. We have already found that the land in question was not the property of the village. The spirit, if not the letter, of this statute was violated by the act of the municipal officers in unlawfully paying

the money of the village to the Lechner heirs not in their futile attempt to convey what the village did not own.

The case of the village seems to rest upon the proposition that the municipality, while it is not bound by the illegal acts of its officers, nevertheless may affirm in part what they did, and thus reap whatever benefit may result from their acts. The proposition is not tenable. Its weakness lies in the unfounded assumption that the illegality of the transaction consists wholly in the unauthorized acts of the agents. We have already found that the scheme could have no legal basis because of the inherent incapacity of the municipality to enter into it.

But it is insisted that to deny the relief sought by the village would be to put it in the power of village authorities to make wrongful use of corporate funds, and then refuse relief to the wronged corporation. We think not; at least not necessarily so. If the vendors, at the time of the attempted conveyance to the village, and the receipt by them of the alleged purchase money, were aware of the purpose of the village authorities in their attempt ⁴⁴³ to acquire the property, no reason is perceived why an action may not be maintained to recover of them the money thus illegally appropriated, and, failing that remedy, it is not impossible that the village officers, who thus undertook to make unauthorized use of the village funds, may be liable. Of course, however, we do not undertake to decide these questions. They are not involved in this controversy, nor are the proper parties before us.

Judgment of the circuit court reversed and petition below dismissed.

MUNICIPAL CORPORATIONS—POWERS.—A municipal corporation possesses no powers except those conferred upon it expressly or by fair implication by the law creating it, or statutes applicable thereto, and such other powers as are essential to the attainment and maintenance of its declared objects and purposes. It cannot do any act, nor make any contract, nor incur any liability, not thus authorized: *Winchester v. Redmond*, 93 Va. 711; 57 Am. St. Rep. 822, and note; *Detroit Citizens' Street Ry. Co. v. Detroit*, 110 Mich. 384; 64 Am. St. Rep. 350, and note.

MUNICIPAL CORPORATIONS—POWER TO AID PRIVATE CORPORATIONS.—The validity of statutes authorizing municipal corporations, expressly or by necessary implication, to subscribe to the stock, or issue bonds for the benefit of railroad or other corporations, has been frequently passed upon. Following the general rules of construction applicable to the powers of municipal corporations, it is plain that in the absence of legislative authority, municipal corporations cannot exercise such functions: See monographic note to *Sharpless v. Mayor*, 59 Am. Dec. 782-790; extended note to *Lowell v. Boston*, 15 A. M. Rep. 56-62.

EQUITY—PARTIES IN PARI DELICTO.—Parties in pari delicto will not be aided or interfered with by a court where the subject matter of the suit is an illegal agreement between them: *Garrett v. Kansas City Coal Min. Co.*, 113 Mo. 330; 35 Am. St. Rep. 713; *Brooks v. Cooper*, 50 N. J. Eq. 761; 35 Am. St. Rep. 793, and notes, though it may interfere for the relief of the less guilty party, whose transgression has been brought about by the imposition or undue influence of the party on whom the burden of the original wrong principally rests: *Bell v. Campbell*, 123 Mo. 1; 45 Am. St. Rep. 505.

STATE v. SULLIVAN.

[58 OHIO STATE, 505.]

OFFICERS—POWER TO REMOVE.—Power conferred upon a mayor to remove from office "for neglect of duty or misconduct in office," is a special power and must be strictly construed. It cannot be exercised arbitrarily, nor until substantial charges have been preferred, which, in judgment of law, embody facts involving neglect of duty or misconduct in office, and of which the accused has had due notice and against which he has had an opportunity to be heard.

OFFICERS—REMOVAL FROM OFFICE—FINDINGS.—Under power vested in a mayor to remove from office for "neglect of duty or misconduct in office," the findings and order of the mayor removing an accused officer from office must be so definite as to show on their face that the power has been exercised according to law, and in what the neglect of duty charged consisted.

OFFICERS—REMOVAL FROM OFFICE—INSUFFICIENT CHARGES AND FINDINGS.—If power is vested in a mayor to remove from office "for neglect of duty or misconduct in office," and another statute imposes upon a board of equalization the duty to equalize returns of personalty only, a charge preferred against such board, alleging that it has knowingly consented to an undervaluation of real and personal property in gross, without alleging any undervaluation of the personalty alone, is not sufficiently definite to support a finding of neglect of duty and removal from office.

Action in quo warranto against Sullivan and others, constituting a board of equalization, to oust them from office and induct others in their place. The board had been removed from office by the mayor of the city of Cincinnati, upon charges preferred alleging neglect of duty and misconduct in office, but the members of the board continued to intrude therein. The respondents recovered judgment and the relator appealed.

Follett & Kelley and S. N. Maxwell, for the plaintiff in error.

E. W. Kittredge and W. M. Ampt, for the defendants in error.

512 **SPEAR, C. J.** Two questions are presented. One relates to the sufficiency of the charges; the other to the action of the mayor upon them. The holding of the circuit court is rested upon the former consideration.

Section 2690 m of the Revised Statutes gives authority to the mayor to appoint the board of supervisors, and also to remove. The latter authority is in these words: "For neglect of duty or misconduct in office, the mayor of such city may remove any member of said board."

This language, taken by itself, may imply an arbitrary power of removal. But that the power is not wholly arbitrary is well settled in this state by the cases of *State v. Hawkins*, 44 Ohio St. 98, and *State v. Bryson*, 44 Ohio St. 457. Nor can its exercise be lawfully attempted until substantial charges, involving neglect of duty or official misconduct, have been preferred. It is held in the former case, as applicable to a removal by the governor, that the charges must embody facts which, in judgment of law, constitute official misconduct, and no reason is perceived why the same strict test should not apply in the case of removal by a mayor. While it is true that the holding of office is not compulsory, and the citizen is at liberty to accept or decline as seems to him best, yet considerations of patriotism and public policy incline the disinterested citizen to accept, ⁵¹³ and it is manifestly for the interest of the state that men of character should be found willing to fill public positions. Such citizens will be less likely to do so if they are to be subjected to arbitrary removal, or their reputations put in jeopardy by removal based upon insufficient charges. The public interests do not require action which shall be unjust to a worthy officer, or which will unfairly smirch a good character, and yet the public interests do require prompt action in case of established inefficiency or corruption. And so our statutes have provided remedies as to removals which, while they do not lodge power in the removing authority which is absolutely arbitrary, do give power which partakes of that character.

In a case under the statute in question, the mayor is the sole judge of the weight and sufficiency of the evidence given at the hearing. If he hears a complaint of neglect of duty, or misconduct in office, upon adequate charges and, upon evidence tending to establish them by him adjudged sufficient, removes the officer, his action is practically final, since no appeal lies, nor can error be prosecuted. Hence the necessity, in justice and common fairness, of his being authorized to proceed only when charges have been made which embody facts that, in judgment of law, constitute neglect of duty or misconduct in office. As said by Mechem in his work on Public Officers, section 452: "The power of removal so conferred must be confined within the limits pre-

scribed for it, and must be pursued with strictness. Hence it can be exercised only for the cause specified and in the manner and upon the conditions fixed": See, also, *Commonwealth v. Slifer*, 25 Pa. St. 23; 64 Am. Dec. 680. ⁵¹⁴ And, with equal propriety, may it be added that the finding and order should be so definite as to show, upon the face of them, that the power has been exercised according to law. This for the reason, among others, that the power exercised by the mayor is not judicial power and the presumptions which attach to the record of courts are not to be applied in the same liberal sense to the record of the mayor. In *McGregor v. Supervisors*, 37 Mich. 388, it is held by Cooley, C. J., that: "The removal from public office is a matter of serious consequence, and it is plain that all the facts which would justify it ought properly to be of record."

The charges here are that Sullivan knew, or should have known, that the tangible property, real and personal, of the street railway company, subject to taxation, was \$10,000,000. Yet he willfully consented to approve the valuation of personal property at \$835,230, and realty at \$350,000, when he knew that the value of the said taxable property was not less than \$10,000,000, with bad intent, et cetera. A similar allegation is made as to the property of the gas company.

But the board, acting as a board of equalization, had, under the statutes, no duty to perform respecting real estate, its power of equalization being confined wholly to personal property, and why the confusing element as to real estate was incorporated in the charges must be left to conjecture. It so confuses the allegation that its meaning is fatally obscure.

There is no statement that Sullivan, or the board, undervalued the personal property, for there is no language equivalent to an averment that the personalty of the railway company was in ⁵¹⁵ fact of higher value than \$835,230. The valuation in gross appears by the charges to have been much too low. But it may be, for anything that these charges show to the contrary, that the undervaluation was wholly on the real estate. So that as conclusion, every word in the charges as made may have been true as therein alleged, and yet no neglect of duty would be shown.

The finding of the mayor is simply that "Sullivan has been guilty of neglect of duty." This finding, being general, cannot be extended by implication to involve a conclusion more comprehensive or specific than the language of the charges. And this, as we have found, means only that as to the whole property

there was undervaluation. In other words, the legal meaning of the finding and order is, that in the judgment of the mayor, the defendant was guilty of a neglect of duty because he had permitted undervaluation of the property in gross, and cannot be held equivalent to a finding that he had been so guilty with respect to that part only of the property of which the board had jurisdiction. It seems to us manifest that, considering the arbitrary character of the power brought into exercise in this case, the charges were too indefinite to justify a trial, and that, unaided by a specific finding showing in what the neglect of duty consisted, the entire record is not sufficient to support an order of removal.

Upon the other branch of the case it will be noted that the answer avers that at the trial "not a word of evidence tending to sustain the truth of the facts alleged in said charges, or either of them, was adduced or heard by said mayor, and that no statement or information of any personal or official knowledge of the mayor, of any kind, tending to ⁵¹⁶ substantiate or prove the facts alleged in said charges, or either of them, was made or communicated to this defendant." It will be further noted that, in his order, the mayor recites that: "I find from the evidence and also from the facts within my personal knowledge," et cetera. As stated elsewhere, the power given the mayor is not judicial within the meaning of the constitution, yet, as already found, it is not to be exercised arbitrarily; that is, a hearing is to be given the accused, and he is to have the opportunity to refute what is adduced against him. So that it would not be a proper exercise of power for the mayor to determine the truth of a charge on his own personal knowledge without making that publicly known, and offering the opportunity above alluded to. If the averment that not a word of evidence tending to sustain the truth of the facts alleged was adduced or heard by the mayor, et cetera, is to be taken as an averment that no testimony at all was heard, but that the mayor's finding rested entirely on facts within his personal knowledge, uncommunicated, and it is insisted by counsel for defendant in error that such is its meaning, then clearly, upon this ground, also, should the mayor's order be held invalid. The majority of the court, at least, inclines to regard the legal effect of the averment as a conclusion of law merely; that is, that in the opinion of the pleader the evidence did not tend to sustain the truth of the charges, and that whatever statement the mayor may have made of per-

sonal knowledge did not tend to substantiate the facts alleged. The decision, therefore, is rested upon the first proposition.

Judgment affirmed.

Minshall, J, dissents.

OFFICERS—POWER TO REMOVE FROM OFFICE—WHEN MAY BE EXERCISED.—The power of removal of an officer for cause is a special authority and must be strictly pursued: *Commonwealth v. Slifer*, 25 Pa. St. 23; 64 Am. Dec. 680. A municipal ordinance authorizing the mayor to remove an officer for cause is valid, and entitles the mayor to exercise all powers incident to the power conferred, such as giving notice to the accused of the charges against him, and hearing witnesses offered either in his behalf or in support of such charges: *State v. Walbridge*, 119 Mo. 383; 41 Am. St. Rep. 663, and note. A sentence and order of removal without such notice and opportunity to be heard is void: *State v. Hewitt*, 3 S. Dak. 187; 44 Am. St. Rep. 788, and note; because the question whether he shall be ousted is a judicial one: *Board of Commrs. v. Johnson*, 124 Ind. 145; 19 Am. St. Rep. 88, and note. Charges against an officer, in proceedings for his removal, should specify the causes with such reasonable detail and precision as shall inform him what dereliction of duty is urged against him: *State v. Duluth*, 53 Minn. 238; 39 Am. St. Rep. 595, and note.

STATE v. GARDNER.

[58 OHIO STATE, 599.]

CONSTITUTIONAL LAW—RIGHT TO REGULATE LABOR. The natural right to labor and enjoy its fruits is subject to reasonable legislative regulation, but cannot be unreasonably interfered with.

CONSTITUTIONAL LAW—REGULATION OF BUSINESS OR PURSUIT.—If the reasonable regulation of a business or pursuit may naturally be expected to promote the health of a community, or relieve of dangers to health which otherwise might follow its careless exercise, it cannot be said that such regulation interferes with the natural right to labor, or unreasonably prevents its exercise.

CONSTITUTIONAL LAW—RIGHT TO REGULATE PLUMBING BUSINESS.—A statute which provides that no person shall engage in the business of plumbing unless he shall have passed an examination as to his competency and qualifications, and procured a license, and providing a penalty for a violation, does not infringe in any sense the constitutional rights of the workman, and is but an ordinary exercise of the police power of the state.

CONSTITUTIONAL LAW—CLASS LEGISLATION.—LAWS UNDERTAKING TO REGULATE BUSINESS must, in all their requirements, operate equally upon all engaged in such business, in order to be valid.

CONSTITUTIONAL LAW—CLASS LEGISLATION—REGULATION OF PLUMBING.—A statute requiring all who engage in the business of plumbing, whether master, or employing plumber, or journeyman, to first pass an examination as to fitness and procure a license, but providing that in case of a firm, or corporation, the

examination and licensing of any one member of such firm, or the manager of the corporation, shall satisfy the requirements of the act, thus permitting all members of a firm or corporation to pursue the business when only one member or the manager has procured such license, is unconstitutional and void, as not operating equally upon all of a class pursuing the same business under similar circumstances.

CONSTITUTIONAL LAW—CLASS LEGISLATION.—A statute which imposes special restrictions or burdens, or grants special privileges to persons engaged in the same business under similar circumstances, cannot have a uniform operation and is void, because it is in contravention of the equal right guaranteed to all in the enforcement of laws and in the enjoyment of liberty and of an equal right in the acquisition and possession of property.

CONSTITUTIONAL LAW—CLASS LEGISLATION.—A statute is unconstitutional and void if it operates unequally, in that it imposes the burden of an examination and license fee upon certain persons, and exempts others of the same class pursuing the same business under similar circumstances.

J. M. Gardner was engaged in the business of plumbing in Akron, Ohio, as an individual without passing an examination or procuring a license as required by the act of April 21, 1896; 92 Ohio Laws, 263. For a violation of such statute he was convicted and sentenced to pay a fine by the mayor of Akron. Gardner appealed to the court of common pleas, and that court reversed the judgment of the mayor, holding such act to be unconstitutional. The state appealed.

R. H. Wanamaker, prosecuting attorney, for the state.

Musser & Kohler, for the defendant.

SPEAR, C. J. The first section of the act in question requires that every person, firm, or corporation, engaged in the business of plumbing, either as master or employing plumber or journeyman, shall first secure a license. The second section requires that any person desiring to engage in or work at the business of plumber shall apply to the president of the board of health, or other officer having jurisdiction in the locality where he intends to engage in, or work at, such business, and be examined as to his qualifications. But, in case of a firm" or corporation, the examination and licensing of any one member of such firm, or the manager of such corporation, shall satisfy the requirements of this act." Section 3 provides that in every city, and in each town having a system of water supply or sewerage, there shall be a board of examiners, consisting of the president of the board of health, the inspector of buildings, if any there be, and three practical plumbers. In localities where the required number of plumbers cannot be secured, such vacancy can

be filled by the appointment of reputable physicians. The members shall be appointed by the board of health, and if there be no such board, then by the health officer. If there be no inspector of buildings then a practical plumber shall be added. Section 4 directs as to time, et cetera, of examinations, and that "the board shall examine said applicants as to their practical knowledge of plumbing, house-draining, and plumbing ventilation, and if satisfied of the competency of the applicant, shall verify to the board of health." The board is then to issue a license. The fee for a master or employing plumber ⁶⁰⁵ is to be five dollars and a journeyman one dollar, to be renewed annually. Section 5 provides for the appointment by the board of health of one or more inspectors of plumbing, who shall be practical plumbers, their term of office, their compensation, and their duties. The sixth section requires the board of health to prescribe rules and regulations for the construction, alteration, and inspection of plumbing and sewerage placed in or in connection with any buildings, subject to approval by ordinance of the council, and the board shall further provide that no plumbing work shall be done, except in case of repairs or leaks without a permit. Section 7 prescribes punishment, of a fine from five to fifty dollars, for any violation, and that the license may be revoked for incompetency, et cetera, after hearing before the board subject to appeal to the state board of health. All money derived from examinations shall go to the board of health.

Applying to the case the general presumption that the acts of the general assembly are to be held valid unless the contrary clearly appears, the natural order of inquiry leads to a consideration of the objections urged against this act. Two are deemed worthy of special notice: 1. That the statute deprives of liberty and property without due process of law, and that it unreasonably interferes with the natural right of the individual to labor and enjoy the fruits thereof: 2. That the statute discriminates against the individual in favor of firms and corporations, and thus imposes unequal burdens upon persons of the same class.

1. Does the act unreasonably interfere with the right to labor? That the right to labor and ⁶⁰⁶ enjoy its fruits is a natural right which may not be unreasonably interfered with is, we presume, not denied by anyone. But it is equally well settled that it is one of the rights which may, under some circumstances, be subject to reasonable regulation. This principle finds examples in our laws termed Sunday laws, in those acts which regulate apprenticeships, the employment of children in factories and

in theatrical and other exhibitions, and in a number of other instances which will readily occur. The acts referred to fall within the exercise of the police power of the state, that power, conceded to reside in the people's representatives, which is rightfully exercised by the regulation of the use of private property, or so restraining personal action as to secure or tend to the comfort, health, or protection of the community. Further examples of its exercise are found in the laws which require study and examination before one is permitted to practice law or medicine, or engage in the occupation of a dentist or a pharmacist. If, then, the regulation of the business of plumbing, and the performance of the work of a plumber, may naturally be expected to promote the health of a community, or relieve of dangers to health which otherwise might follow its careless exercise, and the legislation be appropriate to accomplish the object sought, it cannot be said that such regulation interferes with a natural right or unreasonably prevents its exercise.

We are aware that an opinion prevails in some quarters, and has found expression in judicial utterances, that the pursuit of plumbing is a mere trade which may be easily mastered by anyone possessed of ordinary intelligence; that the ⁶⁰⁷ plumber is not, nor is he expected to be, an expert in the science of sanitation, and hence his work cannot have such relation to the public health as to justify its regulation.

True it is that the business of the plumber is not ranked with the learned professions, and that much of his work is mechanical merely, calling for the exercise of deftness of the hands rather than the possession of scientific knowledge. Yet a certain degree of training and experience is absolutely necessary to render one intelligent as to the groundwork of his calling, as well as competent and skillful in its exercise. He is required to put into our dwellings and public buildings tanks, pipes, traps, fittings, and fixtures for the conveyance of gas, water, and sewage, which require, among other essentials, the keeping out and protection against gases which are destructive of health and not infrequently of life itself. That it is of the highest importance that the drainage and sewerage of our public buildings and private tenements should be as skillfully planned and executed as the modern standard of science admits, would seem not to be open to question. And surely it is reasonable to suppose that one who has been educated to understand the scientific principle necessarily involved in work of this character, and to comprehend the reasons and teachings of experience upon which it is based, and

the evil results which may follow neglect to observe it, will be more likely to provide the needful safeguards than one who is ignorant upon the subject. It is conceded by those who doubt the power as well as the propriety of regulation of the work itself, that the legislature has power to provide for a careful sanitary inspection of plumbing work, and in this ⁶⁰⁸ way secure a result, as to its system and sufficiency, which will tend toward the protection of the health of the general public. But it is difficult to perceive a reason for the exercise of the power last referred to which does not as well apply to the other, for if it be wise to devise means by which a good result may be obtained by careful inspection, it would seem clear that methods which are calculated to reduce the hazards of careless inspection would tend in the same direction. And defects revealed by inspection would, it would seem, be more likely to be remedied if the hands which should be called upon to do the work of correction were guided by minds trained in the science of the business as well as skilled in the mere manipulation of the tools. The question really is, Does the requirement of examination as to the fitness reasonably tend to accomplish the object—is it appropriate to that end; not, necessarily, does it fully accomplish it, nor does it make further care in the same direction unnecessary? We think it does so tend and is appropriate to the purpose, and that, therefore, the act does not unreasonably interfere with the right to labor. It is not here contended that the same high qualifications as to scientific acquirement should be required of the journeyman, one whose principal work is manual, as is required of the master plumber, the one who makes the plans and specifications for the work, and passes judgment upon the strength, durability, and quality of the material and the devices for perfect work; nor does that seem to be the import of the act, especially when it is noted that the fee for license charged is in the one case one dollar, and in the other five. If the examination be sufficiently searching to show ⁶⁰⁹ that the journeyman understands the principles governing his trade, and is sufficiently skillful to be able to produce good results, that would seem to satisfy the scope of this act.

This conclusion finds support in the case of *People v. Warden City Prison*, 144 N. Y. 529, and is distinctly sustained in *Singer v. State*, 72 Md. 464, where it is held that an act which provides that no person shall engage in the business of plumbing unless such person shall have received from the state board of commissioners of practical plumbing a certificate as to his com-

petency and qualification, and providing a penalty for violation, does not violate in any sense the constitutional rights of the workman, but is but the ordinary exercise of the police power of the state: See, also, *Soon Hing v. Crowley*, 113 U. S. 703; *Mugler v. Kansas*, 123 U. S. 623; *Powell v. Pennsylvania*, 127 U. S. 678; *Minneapolis etc. Ry. Co. v. Beckwith*, 129 U. S. 26; *Dent v. West Virginia*, 129 U. S. 114.

2. But a graver objection inheres in the claim that the act imposes unequal burdens upon those of the same class. It will be recalled that the first section requires that all who engage in the business of plumbing, whether master or employing plumber or journeyman, shall first secure a license, and that section 2 provides that in case of a firm or corporation, the examination and licensing of any one member of such firm, or the manager of the corporation, shall satisfy the requirements of the act. That is, a journeyman, for whomever he works, must have a license, and an employing plumber, if not a member of a firm or a corporation, may not pursue the calling without a license. But a master or employing plumber, ^{§10} if he be a member of a firm another member of which has procured a license, is exempt, although he may be one who has, as a journeyman, applied for a license and failed for incompetency. So, too, in case of a corporation, if the manager is licensed, other members of the corporation may work without a license, without reference to their competency.

Our bill of rights prohibits the granting of privileges to one which are denied to others of the same class, and the imposition of restrictions or burdens upon certain citizens from which others of the same class are exempt, and section 26 of article 2, of the constitution requires that all laws of a general nature shall have a uniform operation throughout the state. A statute, therefore, which imposes special restrictions or burdens, or grants special privileges to persons engaged in the same business under the same circumstances, cannot be sustained, because it is in contravention of the equal right which all are entitled to in the enforcement of laws and in the enjoyment of liberty, and in the enjoyment of an equal right in the acquisition and possession of property, and so is not of uniform operation.

The constitutional objection to this statute is that it operates unequally in that it imposes the burden of an examination and license fee upon certain persons, and exempts others of the same class, pursuing the same business in the same way.

It is contended that the act permits firms and corporations

to employ such journeymen as they may choose, whether they be licensed or not, but we are not impressed that it will bear this construction. It is further suggested that the act ⁶¹¹ does not prohibit the doing of plumbing work wholly by apprentices. If it is open to this construction, an additional reason is thus afforded for holding it invalid, but the spirit of the act would not, we think, permit this.

Objection is made to the composition of the examining board on the ground that one who has been appointed a member of the board, although possibly inexperienced and incompetent, may, without any test whatever, continue his occupation. We deem it enough to say as to this that the act does not so provide. It would be possible, of course, that one appointed on the board might meet with greater favor from his fellows in his examination than another, but this possibility would not render the act itself invalid. It also might seem, at first blush, that the appointment of a board to examine others as to fitness and qualifications, the members of which may not have themselves been examined as to their qualifications, is a trifle incongruous. It is possible that the law in this respect might be improved. Yet there must be a start somewhere along the line, and the objection goes to the efficiency of the service rather than to the power of the legislature to authorize the method.

Believing that the act does discriminate unjustly between persons in the same calling, we agree with the conclusion of the learned judge of the court of common pleas, and, for the reasons stated, the exceptions are overruled.

STATUTES—CONSTITUTIONALITY—REGULATION OF BUSINESS.—The right of every person to pursue any lawful business, occupation, or profession, is subject to the paramount right inherent in every government as a part of its police power to impose such restrictions and regulations as the protection of the public may require: *State v. Randolph*, 23 Or. 74; 37 Am. St. Rep. 655, and note.

STATUTES—CLASS LEGISLATION—WHAT IS.—A statute which selects particular individuals from a class or locality, and subjects them to peculiar rules, or imposes upon them special obligations or burdens, from which others in the same class or locality are exempt, is unconstitutional: *State v. Hinman*, 65 N. H. 103; 23 Am. St. Rep. 22. See monographic note to *State v. Ellet*, 21 Am. St. Rep. 780-789. A license fee cannot be imposed upon persons while others of the same class or profession are exempt under similar circumstances and conditions: *State v. Hinman*, 65 N. H. 103; 23 Am. St. Rep. 22, and extended note. Statutes regulating the practice of dentistry and of medicine, providing means of securing the competency of persons engaged therein, and excluding all other persons from such practice, are defensible, both on the ground that they are in the interest of the public health, and are designed and well calculated to protect the public from imposition and fraud. They

have never been pronounced invalid, except when they impose arbitrary discriminations between persons equally well qualified to engage in the profession to which such statute applied: See monographic note to *State v. Goodwill*, 25 Am. St. Rep. 890; *State v. Randolph*, 23 Or. 74; 37 Am. St. Rep. 655, and note; *Eastman v. State*, 100 Ind. 278; 58 Am. Rep. 400.

STATE v. ADAMS.

[58 OHIO STATE, 612.]

OFFICERS—ELIGIBILITY OF WOMEN TO OFFICE.—A notary is an officer, and a woman is ineligible to hold such office, under constitutional provisions requiring an officer to be an elector, and an elector to be a male citizen.

Action in quo warranto to oust from office one Miss Adams who had been appointed and commissioned by the governor as a notary public, and who had given bond and taken the official oath of office and claimed to be lawfully holding such office.

T. S. Monnett, attorney general, J. L. Lott, assistant attorney general, for the state.

A. G. Reynolds, J. Kenney, J. R. Garfield, and W. E. Fink, Jr., for the respondent.

615 THE COURT. The commission was issued to Miss Adams under authority supposed to be conferred upon the governor by the act of April 26, 1898, to amend sections 110 and other sections of the Revised Statutes: 93 Ohio Laws, 405. Before the amendment, the pertinent provision of this section was: "The governor may appoint and commission as notaries public as many persons having the qualification of electors," et cetera. In the amended section the phrase "having the qualifications of electors," is omitted.

The amendment is ineffectual for the purpose contemplated, because section 4 of article 15 of the constitution ordains that "no person shall be elected or appointed to any office in this state unless he possess the qualifications of an elector." The qualifications of an elector are prescribed in section 1 of article 5 of the constitution, and it is required that an elector shall be a male citizen of the United States. That a notary public is an officer seems clear from the nature of his functions, as well as from the authorities upon the subject.

That a notary is an officer, and that a woman is ineligible under these constitutional provisions, are propositions distinctly

held in *In re House Bill No. 166*, 9 Colo. 628. That a notary is an officer is held in *Hill v. Bacon*, 43 Ill. 477, and *Opinion of the Justices*, 150 Mass. 586. The same conclusion is implied in *Warwick v. State*, 25 Ohio St. 21, where it is held that a woman may be deputy clerk ⁶¹⁶ of the probate court, because the acts of such deputy are not independent, but are the acts of the principal.

The contrary view is not supported by *State v. Cincinnati*, 19 Ohio 178, and *State v. Board of Education*, 9 Ohio C. C. 134. It was held in those cases that the qualifications of an elector are not essential to the holding of positions of an official character under the school laws, because of the effect of the constitutional provisions relating especially to the subject of schools. Those cases have not sufficient breadth or strength of foundation to admit of additional superstructure.

The conclusion here reached is in accord with that announced in *State v. McKinley*, 57 Ohio St. 627.

Judgment of ouster.

OFFICERS—ELIGIBILITY OF WOMEN TO OFFICE.—The word "his," as used in a statute or state constitution as referring to the qualifications of officers, includes females as well as males, unless a contrary intent appears by the context or otherwise: *State v. Hostetter*, 137 Mo. 636; 59 Am. St. Rep. 515, and note. A state constitutional provision ordaining that "every male citizen of the United States shall be entitled to vote" confines the right of suffrage to men, and excludes women: Note to *Gougar v. Timberlake*, 62 Am. St. Rep. 496, and note. See monographic note to *Blair v. Ridgely*, 97 Am. Dec. 263-268, on the power of a state to impose qualifications for voters and holders of office.

BROWN v. WHALEY.

[58 OHIO STATE, 654.]

DEEDS—WHETHER OF GIFT OR PURCHASE.—A deed of real estate from a father and mother to their daughter, "in consideration of our love and affection for our daughter, . . . and in consideration of the faithful obedience and faithful services to us of our said daughter, . . . and in further consideration of one dollar to us in hand paid by our said daughter," is not a deed of gift, but a purchase, and the title acquired under such deed is by purchase.

DEEDS—DIFFERENCE BETWEEN GIFT AND PURCHASE.—A deed of gift from an ancestor is supported alone by a consideration, of blood or marriage, but a deed for a consideration other than blood, that is, a valuable consideration, is a purchase.

John Carey and his wife conveyed to their daughter Cinderella, then unmarried, about five hundred acres of land, by the following deed:

“Know all men by these presents that we, John Carey and Dorcas Carey, wife of said John Carey, of the county of Wyandot, in the state of Ohio, in consideration of our love and affection for our daughter, Cinderella Carey, of the county of Wyandot, in the state of Ohio, and in consideration of the dutiful obedience and faithful services to us of our said daughter Cinderella, and in further consideration of one dollar to us in hand paid by our said daughter, Cinderella Carey, have bargained and sold, and do hereby grant, bargain, sell, and convey unto the said Cinderella Carey, her heirs and assigns forever, the following premises situate in Crawford township, Wyandot county, and state of Ohio, and described as follows, to wit: To have and to hold said premises with the appurtenances thereof, unto the said Cinderella Carey, her heirs and assigns forever.”

After the death of Cinderella, her husband continued in possession of all the lands in dispute of which she died seised, claiming to hold them in fee under the statute of descents. Her brothers and sisters claimed that her husband had only a life estate in such lands, and that they would be entitled to them in fee upon his death. He thereupon brought this action against such brothers and sisters of his wife seeking to quiet his title to all the lands. In the circuit court, a judgment was rendered against the husband (Brown) and in favor of the brothers and sisters of his wife in accord with their contention that he had only a life estate in the lands, and that upon his death they descended to such brothers and sisters in fee. The husband appealed.

T. Beer and T. E. Grisell, for the plaintiff in error.

J. D. Scars and G. W. Kinney, for the defendants in error.

663 BURKET, C. J. It is provided in section 4158 of the Revised Statutes that real estate, the title to which came by descent, devise, or deed of gift from an ancestor shall, upon the death of the owner intestate without children or their legal representatives, pass to and vest in the husband or wife relict of such intestate during his or her natural life, and upon the death of such relict shall pass to and vest in the brothers and sisters of such intestate who are of the blood of the ancestor from whom the estate came. If the estate came not by descent, devise, or deed of gift, then the husband 664 or wife relict of such intestate takes the real estate in fee as provided in section 4159 of the Revised Statutes.

The lands conveyed to Cinderella, in this case, by her father and mother, did not come to her by descent or devise, but by deed. If the deed which conveyed said lands was a deed of gift, then the judgment of the circuit court as to said lands is right, and should be affirmed; but if it is not a deed of gift, then the judgment is wrong, and should be reversed.

The matter of deeds and different conveyances, and their legal effect, is so fully and ably presented in the case of *Thompson v. Thompson*, 17 Ohio St. 649, that it would not be profitable to again go over the same ground here. It was held in that case "that a good, as contradistinguished from a valuable, consideration, is sufficient to uphold a deed of conveyance in this state.

By the act of February 22, 1805 (3 Ohio Laws, 279, Chase 515), real estate, for the purposes of descent, was divided into two classes, such as came by descent, devise, or deed of gift from an ancestor, and such as came not by descent, devise, or deed of gift, but was acquired by purchase by the intestate. This left property which came by deed of gift from one not an ancestor unprovided for.

By the act of February 11, 1824 (22 Ohio Laws, 132, Chase, 1313), the words, "but was acquired by purchase by the intestate," were omitted, and ever since that time, the statute in its classification of real estate has remained as it now is: 1. Such as came by descent, devise, or deed of gift from an ancestor; and 2. Such as came not by descent, devise, or deed of gift.

Beginning with the act of 1805, and coming down to the present time, the general assembly has recognized in various statutes that title may be acquired by deed of gift; and it follows that as titles can be acquired by deed of gift, they can be transferred by such deed. By the act of April 13, 1865 (62 Ohio Laws, 172), townships are authorized to acquire real estate by deed of gift. By section 4195 of the Revised Statutes, deeds of gift to the use of the person making the same are declared void, clearly implying that other deeds of gift are valid. In Kent's Commentaries, volume 4, page 463, it is said: "A consideration is generally held to be essential to a good and absolute deed; though a gift or voluntary conveyance will be effectual as between the parties, and is only liable to be questioned in certain cases, when the rights of creditors and subsequent purchasers are concerned."

The great weight of authority is, that as between the parties, a gift or voluntary conveyance is valid, and can only be ques-

tioned by creditors; and by the recognition given by the general assembly to deeds of gift, and the decision in *Thompson v. Thompson*, 17 Oho St. 649, the question as to their validity seems to be fully settled in this state.

Title to real estate acquired by deed of gift from an ancestor is classed with that which came by descent or devise, and all three are known as ancestral property, because the title comes from an ancestor, and comes without price; it costs nothing. In *Walker's American Law*, tenth edition, 392, in treating of the rules of ancestry property, it is said: "In this country, or at least in this state, they have been so far altered that ancestral property, as will be seen hereafter, includes ⁶⁶⁶ all realty acquired from an ancestor, either by descent, devise, or deed of gift, where blood is the only consideration; and purchased property includes realty acquired in any other way." Further along on page 418, the same author says: "Ancestral property is realty which came to the intestate by descent or devise, from a now dead ancestor, or by deed of actual gift from a living one; there being no other consideration than that of blood. Nonancestral property is realty which came to the intestate in any other way."

In providing as to deeds of gift in section 4158 of the Revised Statutes, regard is had to the title, which means the legal title, and not an equitable title. And in *Thompson v. Thompson*, 17 Ohio St. 659, the court say: "No question of equity arises in determining the effect of the deed. The question is purely a legal one." To the same effect is *Patterson v. Lamson*, 45 Ohio St. 77; *Stembel v. Martin*, 50 Ohio St. 495. While equities are inheritable, the course of descent is controlled by the legal title.

Looking now at the deed in question in this case, and having regard to the legal title, uninfluenced by equity, did the title come to Cinderella by deed of gift or by purchase? The deed says that the consideration was love and affection for the daughter. If this was all, it would clearly be a deed of gift. But the deed further recites that it is in consideration of the dutiful obedience and faithful services to us of our said daughter, and in further consideration of one dollar to us in hand paid by our said daughter. Standing alone, these considerations of obedience, services, and one dollar would clearly make the title one by purchase. How then shall it be solved when the ⁶⁶⁷ considerations are thus mixed? The title came either by deed of gift or by purchase. It could not come by both; and, legally speaking, it could not come partly by deed of gift and partly by purchase. The law, as above quoted from Walker, solves the

question. He says that to make ancestral property—title by deed of gift—there must be no other consideration than that of blood. Here there was other and additional consideration, and therefore the title came not by deed of gift. As the title came not by deed of gift, it came by purchase, and at the death of Cinderella passed to and vested in her husband, the plaintiff in error, in fee.

The dutiful obedience and faithful services of the daughter may have been rendered under such circumstances as to create no legal obligation against the father to pay for the same, even though of great value to him; yet when he voluntarily recognized their value by making them the consideration, in part at least, for the conveyance of a tract of land, he could not after the contract, as evidenced by the deed, was executed, and the deed delivered, annul the same by pleading that he was not legally bound to compensate her. He might well have interposed such plea while the matter was executory, but after being fully executed such plea can avail nothing. What he could not do while living, his heirs cannot do after his death. They stand in his shoes.

Moreover, the consideration of one dollar alone is sufficient to support the deed as between the parties, and to give it the character of being upon a valuable consideration, as contradistinguished from a good consideration.

Under the statute of uses, before the statute would execute the use, in bargain and sale, a valuable ⁶⁶⁸ consideration had to appear, but one dollar was sufficient, no matter what the value of the estate. But a covenant to stand seised to the use of another required, not a valuable, but a good consideration, such as blood or marriage: 2 Blackstone's Commentaries, 338.

The legislature seems to have had these distinctions in mind in framing our statute of descents as to deeds of gift, and intended that a deed of gift from an ancestor should be supported alone by a consideration of blood or marriage, and that a deed for a consideration other than blood, that is a valuable consideration, should be regarded as a purchase.

There is, therefore, a clear distinction between our statutes as to deeds of gift and the statute of California as to gifts of real estate to a wife, and the decisions under the latter statute would not be applicable here: See *Peck v. Vandenberg*, 30 Cal. 11; *Salmon v. Wilson*, 41 Cal. 595; *Bradley v. Love*, 60 Tex. 472.

From the view thus taken, the other questions made in the record are of no importance, and nothing need be said as to them.

The circuit court erred in applying the law to the conceded and controlling facts, and the judgment complained of in the petition in error will be reversed and judgment entered for the plaintiff in error.

Judgment accordingly.

Deeds—Consideration—Gift or Purchase.

A gift, as applied to land, is undoubtedly the voluntary transfer of the property without a valuable consideration. In other words, it is the voluntary transfer of the title to the land to one who receives it without paying anything for it: 1 Devlin on Deeds, sec. 11. On the other hand, a purchase, in the ordinary and popular acceptance, is the transmission and conveyance of the title to land from one person to another by their voluntary act and agreement, founded upon a valuable consideration: *Maydwell v. Maydwell*, 9 Heisk. 571-577; *Grant v. Bennett*, 96 Ill. 513-535.

Sometimes deeds conveying large and valuable tracts of land recite the payment of a merely nominal consideration. The question then arises whether the conveyance is a deed of gift or a deed of purchase, and whether the purchaser is a bona fide purchaser for value, whether he takes an estate in fee simple, and the like. Upon this subject the authorities are sparse, unsatisfactory, and conflicting. We do not intend to deal with the question of fraud as affected by the consideration, but merely with the question whether, as between the parties to the conveyance and their privies, the deed should be deemed a gift or a purchase under the circumstances surrounding the case. In the beginning, then, it may be stated to be a general rule that a deed of purchase, or bargain and sale, as it is universally denominated, is supported by a pecuniary consideration, however small: *Bell v. Scammon*, 15 N. H. 381; 41 Am. Dec. 706. It has been held that to operate as a bargain and sale deed, sufficient in form, the only other thing necessary to the conveyance is a pecuniary consideration. This may be either expressed in the deed or proved independently of it, and, if expressed, proof of its actual payment is not required, nor can it be controverted by evidence, for the purpose of avoiding the deed. Though the consideration paid is merely nominal, yet it is sufficient to convey an estate in fee: *Ocheltree v. McClung*, 7 W. Va. 232; *McCubbin v. Cromwell*, 7 Gill & J. 157; *Jackson v. Alexander*, 3 Johns. 484; 3 Am. Dec. 517; *Wood v. Chapin*, 13 N. Y. 509, 517; 67 Am. Dec. 62; *Okison v. Patterson*, 1 Watts & S. 395. The recital in a deed that it is made upon the further consideration of one dollar to us in hand paid makes the deed one of bargain and sale, and the transaction a purchase, as the one dollar is a valuable consideration sufficient to support the transaction: *Rockwell v. Brown*, 54 N. Y. 210; *Mason v. Moulden*, 58 Ind. 1. And it makes no difference that love and affection is mentioned as part of the consideration for such deed: *Mason v. Moulden*, 58 Ind. 1. A recited payment of one hundred dollars, besides natural love and affection, as the consideration of a deed executed by a husband in favor of

his wife, conveying property worth at least twelve thousand dollars, is only a nominal consideration, but it estops the husband or his heirs, in a controversy with the wife or her heirs, from alleging that the deed was merely voluntary and a gift, and while parol evidence may be received to show that less than the amount recited in the deed was paid, it is not admissible to show that nothing was in fact paid, for the purpose of changing the character of the instrument: *Ohmer v. Boyer*, 89 Ala. 273. A deed to certain town lots, purporting to be in consideration of five dollars, and granting the property to the bishop and his successors in office for the use of the Roman Catholic Church, is not a gift, but a purchase, and under such deed the grantee takes a fee simple title in trust for the benefit of the church: *Olcott v. Gabert*, 86 Tex. 121. Where a father, in advanced years and in anticipation of his death, conveyed his farm to one of his sons, to be paid for in a conveyance of a part to another son, and a part by note and mortgage, and the balance of the price was to be a gift, it was held that the son as grantee took as a purchaser: *Spear v. Griffith*, 86 Ill. 552. So far authorities support the decision in the principal case, but there are others which maintain a contrary doctrine, and cannot be harmonized therewith. In the recent case of *Sires v. Sires*, 43 S. C. 266, it appeared that a testator devised his lands to his widow for life, with power "to sell, dispose of, and convey any portion of or all of my estate." The widow conveyed the lands to her son, and the consideration of the conveyance, as stated in said deed, was three dollars. The court said: "The next question for consideration is, whether the land was sold, or conveyed as a gift. The deed recites a consideration of three dollars, the receipt of which is therein acknowledged. The presiding judge, in his decree, says: 'Mrs. Sires had no power to sell for a mere nominal consideration, which seems not to have been paid, and the evidence is not sufficient to convince me that there was any other consideration for the deed. If, indeed, any services were rendered to her by her son, for which any payment was expected by either of them, the evidence fails to show sufficiently that these services were the true consideration of the deed.' After a careful reading of the testimony, we agree with the circuit judge in his finding of fact, as to the consideration upon which the property was conveyed. The consideration of three dollars expressed in the deed is nominal and formal. The property was, therefore, conveyed as a gift": *Sires v. Sires*, 43 S. C. 272, 273. It has also been held that where all the circumstances attending the transaction show that the deed was intended as a gift, the fact that the grantee actually paid a merely nominal consideration in money will not cause him to be treated as a purchaser for value within the meaning of the recording laws, and he is not entitled to priority over a prior unrecorded deed. Thus in *Ten Eyck v. Whitbeck*, 135 N. Y. 40, 31 Am. St. Rep. 809, it was decided that to constitute a grantee a purchaser for value, the consideration of the grant must be not only good but valuable, in the sense that a fair equivalent be given for the property conveyed. Where, therefore, the owner of a farm worth twenty thousand dollars conveys it to his wife, and six years after, and before the former deed is recorded,

conveys it to his daughter by a deed reciting a consideration of ten dollars and the annual payment to the grantor during his lifetime of the entire net proceeds of the farm, and of one-third of such proceeds to his wife during her lifetime if she survived him, and of one-third thereof to another daughter for the same period, and providing for the disposal of the proceeds in a specified way upon other contingencies, with power in the grantee to sell the property after her mother's death, the grantee under the second deed is not a subsequent purchaser for value within the meaning of the recording statute, and her deed, though first recorded, is no bar to an action of ejectment brought against her by the successors in interest of the grantee under the first deed: *Ten Eyck v. Witbeck*, 135 N. Y. 40; 81 Am. St. Rep. 809. This case was followed in *Turner v. Howard*, 42 N. Y. Supp. 335, decided by the supreme court of New York, appellate division, third department, December 8, 1896, where it was held that a recital in a deed to the grantor's sister, that it was made in consideration "of one dollar and other good and valuable considerations" is insufficient to entitle the grantee to the rights of a purchaser for value. In *Morris v. Ward*, 36 N. Y. 587, the conveyance was to a granddaughter, and recited a consideration of one dollar paid and natural love and affection, and the court held that it was an advancement and not a sale, and that the grantee took as donee, and not as purchaser, and that it was competent where the whole transaction shows the money consideration to have been intended as nominal merely, to give effect to such proof and to the intention which it indicates. This case also holds, clearly and directly, that a merely nominal consideration of one dollar will not change the character of a deed from a gift to a purchase: *Morris v. Ward*, 36 N. Y. 587. In the leading case of *Peck v. Vanderberg*, 30 Cal. 11, it appeared that a deed from a mother to her eight children, some of whom were married women, recited a consideration of natural love and affection, and the further sum of five dollars in hand paid before the sealing and delivery of the deed, and it was held that the deed imported upon its face a gift within the meaning of the provisions of the constitution and statutes of California relating to the separate property of married women and not a conveyance upon a money consideration. The grantees, therefore, took a separate estate under the deed, and parol evidence was admissible to show that such deed was given without any money consideration having passed, for the purpose of proving the deed to have been one of gift, and not a purchase. Again in *Salmon v. Wilson*, 41 Cal. 595, a grantor conveyed to his children an undivided interest in a large ranch of great value, in consideration of love and affection, and in the further consideration of four hundred and sixty-one dollars, to him in hand paid by the parties of the second part, and it was held that the deed itself, taken in connection with the difference between the real value of the property conveyed and the small sum named as the consideration, and in view of the condition of the parties, their relations and the surrounding circumstances, showed that the transaction was a gift and not a sale and purchase. In this case, Mr. Justice Crockett, delivering the opinion of the court, said: "If

the recital of this paltry money consideration, so insignificant as compared with the value of the estate, is to convert the transaction into one of bargain and sale, no reason is perceived why the same result would not have ensued if the sum named had been one dollar or one cent for each of the children, instead of fifty-eight dollars. The disproportion between the price named and the value of the estate would have only been a trifle greater in one case than in the other; but in either case it is so enormously large as clearly to indicate that the money consideration did not in fact enter into the transaction as one of its material elements. It was clearly the intention of Bojorgues to donate this large and valuable estate to his children in equal portions and not to sell it to them. Hence, we find the conveyance to his married daughters is made to them in their own names, excluding their husbands, and, in the case of Theodosia, she is named by her maiden name, and her husband is not referred to. The parties to the deed must be presumed to have known that, under the law, as it then was and now is, all property acquired by the wife during the marriage by gift, bequest, devise, or descent became her separate estate, and that all acquired otherwise became the common property of the husband and wife, and was subject to disposition by the husband without the consent of the wife. It is clear that Bojorgues, in conveying this valuable property to his married daughters, had no intention to convey it, practically, to their husbands, and particularly in the case of Theodosia, who had been for some years living apart from her husband. But, if we should hold that the insertion in the deed of an inconsiderable money consideration by the scrivener who drew it up had the effect to convert the transaction into one of sale, I am convinced we would give an effect to this deed which never entered into the minds of the parties to it at the time it was made. Our statute could not have been intended to work so flagrant a wrong as would result in this case were we to hold that the deed from Bojorgues to his married daughters was in fact, and was intended to be, a deed of bargain and sale, and not a gift. But enough appears on the face of the conveyance, when construed in connection with the conditions of the parties, their relations to each other, and other circumstances, to render it apparent that the transaction was in fact a donation and not a sale, in the true sense of the statute defining the rights of husband and wife, and this, too, without the aid of parol evidence to show the actual intention of the parties and the precise facts of the transaction": *Salmon v. Wilson*, 41 Cal. 606, 607. If a deed made by a father to a daughter and her husband, grants them a fee and recites a consideration of one thousand dollars, which in fact was not paid, and the evidence shows that the transaction was intended as a gift, the deed must be deemed as being a donation to such husband and wife by which the wife acquired an undivided half interest in the land conveyed by such deed, as her separate estate: *Bradley v. Love*, 60 Tex. 472.

CASES
IN THE
SUPREME COURT
OF
OREGON.

LITTLE NESTUCCA ROAD CO. v. TILLAMOOK COUNTY.

[31 OREGON, 1.]

EMINENT DOMAIN.—THE RIGHT TO TAKE LANDS ALREADY APPROPRIATED TO ONE PUBLIC USE for the purpose of appropriating them to another exists only when there is a statute clearly conferring such authority. A statute authorizing the laying out of a public highway does not justify taking therefor lands previously devoted to some other public use.

EMINENT DOMAIN.—THE TAKING OF LAND ALREADY DEVOTED TO ONE PUBLIC USE and appropriating it to another may be authorized by the legislature, but the authority must be conferred by express terms or arise from necessary implication.

EMINENT DOMAIN.—PROPERTY ALREADY DEVOTED TO ONE PUBLIC USE cannot be taken for another without first making compensation to the persons interested in the previous public use. Hence, lands used as a public toll road cannot be taken for public highways free from such tolls, unless the owners of the toll road are compensated for moneys expended by them in acquiring the right of way and in making improvements.

PLEADING — ANTICIPATING DEFENSES. — Ordinarily, a plaintiff need not in his complaint anticipate or negative a possible defense. Hence, where plaintiff seeks to enjoin the taking of his property for a public use, he need not aver that he has not received compensation for such taking.

Thayer & McCoy, W. J. May, Claude Thayer, William T. Thayer, and W. J. May, for the appellant.

Samuel Hayden, district attorney, E. E. Selph, T. G. Handley, and Cicero Milton Idleman, attorney general, for the respondent.

• **MOORE, C. J.** This is a suit to enjoin a threatened trespass. The plaintiff alleges, in substance, that, having been duly incorporated for that purpose, it built at great expense, and for more than ten years last past has been the owner of, and expended large sums of \$ money in maintaining the sixty foot toll road

extending from the eastern boundary of said county through the town of Dolph, thence westerly along the banks of the Little Nestucca river to the Pacific Ocean, and that under the laws of this state it is entitled to demand and has been collecting tolls for travel thereon, which have been and are of great value; that D. P. Harvey and others having petitioned therefor, the county court appointed viewers and a surveyor, who viewed and surveyed a proposed county road, as prayed for in the petition, directly along and upon plaintiff's toll road, and the report of the viewers being favorable, the said court, on July 3, 1895, having awarded to one William Baxter the sum of twenty-five dollars damages on account of the opening of said road, made a pretended order that said report and the plat of the survey be recorded, and thereupon declared the line of road so viewed and surveyed a public highway, and directed the defendant, George E. Mizner, as road supervisor, to open the same; that these proceedings and the pretended orders of said court are null and void, notwithstanding which Mizner threatens to and will, unless restrained, tear down and remove the gates from plaintiff's toll road, and trespass upon its property; that this pretended county road, if allowed to be opened to public travel, would be a virtual appropriation of the said toll road, a nullification of plaintiff's charter, and a destruction of its franchise, and if the orders of the said court are permitted to be executed and the threats of Mizner to be performed, they will result in irreparable injury to the plaintiff, for which it has no adequate remedy at law, and ⁴ prays for a perpetual injunction to prevent the threatened mischief. A demurrer was sustained to the complaint, upon the ground that it did not state facts sufficient to constitute a cause of suit.

Counsel for the plaintiff contend that the decision of the court was predicated upon the assumption that the county court had authority to lay out a public road directly upon the ground used and occupied by their client for its toll road. The statute authorizes a corporation organized for the construction of any macadamized, plank or clay road to appropriate so much of any land between the termini thereof as may be necessary for its use, not exceeding sixty feet in width, and when such road is completed and fit for travel, the corporation, by giving notice thereof, has the power to make it a public highway, and, upon placing gates thereon, may collect such toll as may be prescribed by the county court of the county where such road is located: Hill's Annotated Laws, secs. 3239-3249. Such a corporation is required

to keep an accurate account of the moneys expended in the construction and repair of its road, including any sum paid for lands appropriated, and also to keep a like account of the tolls received and other profits, which shall be verified by the oath of its president or one of its directors, and a copy thereof deposited with the county clerk with whom the articles of incorporation are filed; and at any time after the expiration of ten years from the time of taking such tolls it shall be lawful for the county court of any county through which the road shall pass to pay such corporation the amount of money so expended by it, and interest thereon, after ⁵ deducting the amount of tolls and other profits received by it, and thereupon the said toll road shall become the property of such county: Hill's Annotated Laws, secs. 3255-3256. If the right of the county court to appropriate the plaintiff's property be based upon the general provisions of the statute relating to the method of laying out, altering, or locating county roads (Hill's Annotated Laws, secs. 4061 et seq.) it must be admitted that the decree complained of is erroneous. Judge Elliott in his work on Roads and Streets, in discussing this question, says: "The right of eminent domain is a dominant legislative power only called into exercise by the enactment of a valid statute, and when a party asserts a right to seize land previously appropriated to a public use, he must sustain his claim by producing a statute clearly conferring the asserted authority. It will not be presumed, in the absence of such a statute, that the legislature intended to again seize property which had been once appropriated. An act providing for the laying out of a road or street, and the assessment of benefits and damages in favor of and against landowners, will not authorize the appropriation of lands already used for public parks. Nor will an act of such a character warrant the seizure of land previously appropriated for a turnpike." The statute prescribes the method and makes ample provisions for laying out a county road and assessing the damage resulting to those persons upon whose lands it may be established; but no provision is made in the general act upon this subject whereby a county road can be located over land already appropriated to a public use: Hill's Annotated Laws, secs. 4061-4104. The appropriation ⁶ of land to a public use is an exercise of the sovereign power, which the state may delegate to a municipal or private corporation, and land already appropriated and used by its trustee, under the authority delegated, may be taken by legislative enactment for other public uses, in which case it is always presumed that the new use is of more import-

ance and greater value to the public than the original appropriation: *Mills on Eminent Domain*, sec. 45; *Baltimore etc. R. R. Co. v. North*, 103 Ind. 486. It is a rule, however, of universal application that the subsequent delegation of power to appropriate land which has once been appropriated must be in express terms, or must arise from necessary implication: *Boston Water Power Co. v. Boston etc. R. R. Corp.*, 23 Pick. 360; *Proprietors of Locks v. Lowell*, 7 Gray, 223; *Boston etc. R. R. Co. v. Lowell R. R. Co.*, 124 Mass. 368; *Providence etc. R. R. Co. v. Norwich etc. R. R. Co.*, 138 Mass. 277; *Hickok v. Hine*, 23 Ohio St. 523; 13 Am. Rep. 255; *State etc. v. Montclair N.Y. Co.*, 35 N. J. L. 328; *New Jersey etc. R. R. Co. v. Long Branch Commrs.*, 39 N. J. L. 28; *In re Buffalo*, 68 N. Y. 167.

The right of the state to appropriate to a new use property which has already been subjected by a municipal or private corporation to a public burden must rest upon the authority of the state to change at pleasure its trustees and the object of its trust; but when the trustee has an interest by reason of money expended in the purchase of the right of way, or in improvements made upon the property, under the power delegated, the state must provide a method of compensation for such interest before the property ⁷ affected thereby can be appropriated to a new use. The legislative assembly has, by statute, provided a method of acquiring the toll roads of such corporations, and prescribed the compensation to be paid for their interests on reappropriation by the county (*Hill's Annotated Laws*, secs. 3239-3257), and the plaintiff, in acquiring its property, took the same with notice that its toll road might be converted into a county road.

Counsel for the defendant insist that as the only method prescribed for acquiring the road in question was by payment of the cost of its construction, et cetera, under the terms prescribed by the statute, it must be presumed that the county court paid the amount of money required therefor of it, and, as this presumption is not negatived by the allegations of the complaint, the court properly sustained the demurrer. The county court of each county exercises supervision over all roads within its borders, and all applications for laying out, altering, or locating county roads shall be by petition to the county court of the proper county: *Hill's Annotated Laws*, secs. 4061, 4062. Section 3256 of the code does not make a petition to the county a prerequisite to the exercise of the right to appropriate the road of a private corporation, but, after the corporation has enjoyed the privilege of collecting tolls for a period of more than ten

years, a proceeding to appropriate its property by the county court may be instituted; and, as such method must necessarily be a transaction in invitum, it would seem to follow that section 3256 should be construed in *pari materia* with section 4062, in which case a petition and notice of some kind, at least, are requisite to confer upon the ⁸ county court jurisdiction to appropriate the toll road of a private corporation within its territory.

The complaint alleges that upon the petition of D. P. Harvey and others the county court of Tillamook county made a pretended order establishing a county road directly along and upon plaintiff's said toll road, but the pleading does not state that any notice of the application was ever given, or that any sum was ever paid to the plaintiff as a compensation for the loss of its property and franchise. It is true the complaint alleges that the sum of twenty-five dollars was awarded to one William Baxter as damages, et cetera, but it does not appear that there was any privity between this person and the plaintiff. If the want of notice be deemed immaterial, the payment of the amount prescribed by the statute (Hill's Annotated Laws, sec. 3256), is certainly a condition precedent to the right of the county court to appropriate this toll road, and this presents the question whether the complaint should have alleged a neglect in this respect. The rule is general that the plaintiff is under no legal obligation to the adverse party to advise him of the defense he should interpose, and under this rule the complaint in code pleading ought not to anticipate or negative a possible defense (Boone on Code Pleading, sec. 11; Bliss on Code Pleading, sec. 200; 4 Ency. of Pl. & Pr., 614), and a condition which qualifies or defeats the plaintiff's suit, being a condition subsequent, may be safely ignored by him in the pleading: 4 Ency of Pl. & Pr., 628. A statement of these facts, which might be deemed a condition subsequent as to plaintiff's right of suit, must be considered a condition precedent to the defendant's ⁹ right of appropriation, and under the rules hereinbefore announced it would seem to be the duty of the latter to plead the statute and the performance of its conditions as a foundation for its defense. The plaintiff was under no legal obligation to set out these facts in its complaint, an examination of which leaves us in doubt as to whether the alleged attempt of the county court to acquire this property was made under the general statute or by virtue of the special provisions for the appropriation of toll roads; but in any event we think

it was the duty of the defendant to raise this question by answer. The demurrer must therefore be overruled, the decree reversed, and the cause remanded for such further proceedings as may be deemed just and proper, not inconsistent with this opinion.

Reversed.

EMINENT DOMAIN—PROPERTY ALREADY DEVOTED TO PUBLIC USE.—It is not true that property already devoted to one public use may not be subjected to another: *Chicago etc. Ry. Co. v. Starkweather*, 97 Iowa, 159; 59 Am. St. Rep. 404, and note. The franchises or property not in actual use of one railroad may be taken for the construction of another in all cases where the property of an individual might be; but this can be done only upon making compensation therefor, the same as in the case of an individual: *Note to Butte etc. Ry. Co. v. Montana etc. Ry. Co.*, 50 Am. St. Rep. 538. Authority given in general terms is not sufficient to authorize the taking for an inconsistent use of property already devoted to a public use, and necessary for the purpose to which it is devoted: See monographic note to *Appeal of Sharon Ry. Co.*, 9 Am. St. Rep. 142, 143. The intention of the legislature to grant the power to take land or property already devoted to another public use must be shown by express words, or by necessary implication: *Louisville etc. R. R. Co. v. Whitley County Court*, 95 Ky. 215; 44 Am. St. Rep. 220, and note. Statutes authorizing such taking without compensation are unconstitutional: *Southwestern R. R. Co. v. Southern etc. Tel. Co.*, 46 Ga. 43; 12 Am. Rep. 585; *Connecticut River R. R. Co. v. County Commrs.*, 127 Mass. 50; 34 Am. Rep. 338.

BAKER v. STATE INSURANCE COMPANY.

[81 OREGON, 41.]

INSURANCE—DESCRIPTION OF PROPERTY.—It is not necessary in insuring property that its locality be fixed by such technical, legal descriptions as are ordinarily employed in conveyances of real property. It is not material, therefore, in an action to recover on a policy insuring a dwelling-house and personal property therein against loss by fire that the block in which the dwelling was situated was described in the policy as being in Harlington addition to Mt. Tabor, whereas there is no such addition, and the property was in Harlem addition to East Portland.

INSURANCE—BREACH OF WARRANTY OF THE TITLE OF THE ASSURED.—One in possession of real property under a contract of purchase entitling him to remain in possession, and to a conveyance of the title upon completing payment therefor in certain installments, is to be deemed the owner for the purpose of a policy of insurance, and is justified, in his answers in his application, in stating that he is the sole and undisputed owner of the property, and that the title is in his name.

INSURANCE—FRAUD IN ANSWER RESPECTING THE VALUE OF PROPERTY.—An answer respecting the value of the land and buildings upon which insurance is sought will not be regarded as fraudulent unless so far at variance with the truth that a fraudulent purpose must be presumed. All that is required is the honest judgment or opinion of the applicant upon the subject.

R. & E. B. Williams and W. T. Slater, for the appellant.

Williams, Wood & Linthicum, for the respondent.

⁴² WOLVERTON, J. This is an action upon a policy of insurance to recover a fire loss of four hundred dollars on a dwelling and two hundred dollars on household furniture. The defense interposed is that plaintiff, by her written application, and as an inducement for the issuance of the policy of insurance, made answers to certain inquiries touching the value of the building and land upon which it is situate, and the ownership and title of the land, in substance as follows: ⁴³ Q. What is the actual cash value of your land and buildings thereon? A. One thousand dollars. Q. Are you the sole and undisputed owner of said lands and property to be insured? A. Yes. Q. Is the title to the land on which said buildings are situated in your name? A. Yes; that by the terms of the application the plaintiff agreed that each of said questions was correctly answered, and that such valuations and statements were true, and a warranty upon her part, and that the acceptance of the risk and the issuance of the policy should be based solely upon such application; but that she answered falsely, in disregard of such conditions, whereby she has suffered a breach of the warranty, and thus rendered the policy void. The property insured is described in the policy as "situated on and confined to the premises now actually owned and occupied by the assured, to wit: lots 27 and 28, block 8, in Harlington addition to Mt. Tabor, Multnomah county, Oregon," and it is described in substantially the same manner in the complaint, but the evidence shows that the premises upon which the dwelling was located are correctly described as lots 27 and 28, in block 8, Harlem addition to East Portland, and it was further shown, over the objection of defendant, that there was no such place as "Harlington addition to Mt. Tabor."

1. Upon this state of the record, it is first contended that there is a complete and fatal variance between the pleadings and the proof touching the description of the property covered by the policy of insurance, by reason whereof plaintiff is not entitled to recover. The objection goes to the identification of the locus in ⁴⁴ quo of the dwelling, and it is not a question whether the description is sufficient to carry title, or to identify property conveyed or transferred. It is never necessary, in insuring property, that the locality be fixed or established by such technical legal descriptions as are usually employed in

conveyances of title, and it is not infrequently the case that insurance companies employ maps, for convenience in the designation and location of buildings and property for insurance purposes, which have no sort of reference to any public or legal surveys or plats, and descriptions by reference thereto are accounted sufficient. As it pertains to the location, and the question whether the loss is within the policy, the evident intention of the parties, to be gathered from the language used, in connection with the nature of the property and the uses and purposes to which it is devoted, will prevail: 1 Wood on Insurance, sec. 47. And it has been held in California that if enough of the description is true to identify the property, other portions of it which are false may be disregarded, when the question is merely what property was insured: Hatch v. New Zealand Ins. Co., sec. 67 Cal. 122; 2 May on Insurance, sec. 420 a. Omitting and disregarding all reference to "Harlington addition to Mt. Tabor," or to any subdivision thereof, we think there is enough left to identify the property insured, and it was pertinent to show that there was no such addition, but that Harlem addition to East Portland was the one to which reference should have been made. There would be left the following description, viz: "A frame dwelling-house situated on and confined to premises ⁴⁵ now actually owned and occupied by the assured," and this is sufficient for the purposes of the insurance, and for a recovery in the case of loss. There was a latent ambiguity, and the evidence offered was competent to explain it.

2. It appeared from the testimony that plaintiff was not the owner in fee of the land upon which the dwelling was situated at the time the insurance was effected, but that she held a contract with the owners of the legal title for a conveyance by good and sufficient deed, conditioned upon her completing payment therefor in certain installments and at designated dates; and it is contended that this discloses a state of affairs inimical to plaintiff's warranty touching the ownership and title. The warranty is in substance that plaintiff is the sole and undisputed owner of the lands and property insured, and that the title to the land is in her name. It goes to the ownership and title to the land, and the question is, Do the record and proofs show the warranty to be false? If they do, the plaintiff cannot recover. In *Susquehanna etc. Ins. Co. v. Staats*, 102 Pa. St. 529, a purchaser at sheriff's sale, subsequent to the purchase but prior to the delivery of the sheriff's deed, represented to the

company that the land was "owned by the applicant," and it was held that there was no such absence of title in the assured as that the representation would affect the validity of the policy. In *Pennsylvania etc. Ins. Co. v. Dougherty*, 102 Pa. St. 568, the assured purchased from executors a lot of ground upon which there was a building, paid the purchase money, received a receipt, and had gone into possession, but prior to the ⁴⁶ execution of the deed she had the building insured. By her application she represented that the title to the house and lot was in her name, and by the terms of the contract of insurance the answers and representations made in the application were taken as part of the contract, and were warranted to be true; and the court held that, as the equitable title to the property was vested, it was for all the purposes of the suit equivalent to a fee. In *Lebanon etc. Ins. Co. v. Erb*, 112 Pa. St. 149, it was held that it was not essential that the assured should have been invested with the legal title, if he was the sole, absolute, and beneficial owner in equity, and this under a condition in the policy as follows: "If the property to be insured be held in trust or on commission, or be leasehold or other interest not amounting to absolute or sole ownership, . . . it must be so represented to the company, and expressed in the policy in writing, otherwise the insurance as to such property shall be void." In *East Texas Fire Ins. Co. v. Dyches*, 56 Tex. 573, it was held that where the entire equitable right in or to the land is in the assured, and he is in a condition to enforce specific performance, there is no breach of the warranty. In *Hough v. City Fire Ins. Co.*, 29 Conn. 10, 76 Am. Dec. 581, the assured represented by his application that the property insured was "his house," and the policy contained a condition that "if the interest in the property to be insured is not absolute, it must be so represented to the company and expressed in the policy in writing, otherwise the insurance shall be void." The legal title was, however, in another person, with whom he ⁴⁷ had at the time a parol contract for its purchase for an agreed price, part of which he had paid, and he had entered into possession; and it was held that his equitable title should be regarded as an absolute interest, and therefore that the insurance was not void. To the same effect is *Gaylord v. Lamar Fire Ins. Co.*, 40 Mo. 15; 93 Am. Dec. 289; *Swift v. Vermont etc. Fire Ins. Co.*, 18 Vt. 305; *Pelton v. Westchester Fire Ins. Co.*, 77 N. Y. 605; *Rumsey v. Phoenix Fire Ins. Co.*, 17 Blatchf. 527; 1 Fed. Rep. 396; *Martin v. State Ins. Co.*, 44 N. J. L. 490; 43 Am. Rep.

397; *Bonham v. Iowa Central Ins. Co.*, 25 Iowa, 328. The instructions of the learned trial judge touching the question proceeded upon the theory that if plaintiff had contracted for the purchase of the land upon which the building was situated, had gone into possession and performed on her part all the conditions thereof to the date of the application, she should be deemed to be the owner, and, for the purposes of the policy, the title was in her name. This is in full accord with the authorities cited, and is, as we believe, the law of the case. The plaintiff, if not in default, was the sole and undisputed equitable owner of the lands, and when she answered that the title was in her name, she answered truly, in the ordinary acceptation of the term. In common parlance, the term is used to express ownership, regardless of any technical legal import, and an absolute equitable ownership fills the measure of common understanding quite as fully as legal ownership. It was not expected that plaintiff should answer technically touching her ownership and title, and the construction of her warranty ⁴⁸ ought not to be circumscribed as if she had spoken in a technical sense. These conclusions are especially applicable in the present case, as it was shown that when the plaintiff made the application she produced her contract for the inspection of the agent, who wrote out the answers for her, and no doubt they were given with special reference to her title as acquired by and through the contract.

3. The answer touching the value of the land and building involved somewhat the expression of an opinion; and unless it is tainted with fraud, or so widely at variance with the truth that a fraudulent purpose must be presumed, it ought not to render the policy void. The honest judgment and opinion of the party making such valuation is all that is required: *Phoenix Ins. Co. v. Pickel*, 119 Ind. 155; 12 Am. St. Rep. 393. The question was submitted to the jury in this light, and properly so. The question involved in the motion for nonsuit, if it can be urged at all under the pleadings, is necessarily disposed of by the foregoing considerations.

The judgment is affirmed.

INSURANCE—DESCRIPTION OF PREMISES.—The minds of the insurer and the insured must meet as to the subject matter: *Sanders v. Cooper*, 115 N. Y. 279; 12 Am. St. Rep. 801. But the fact that a policy of insurance on a dwelling-house misdescribes the land on which the dwelling is situated does not affect the risk nor render the policy void: *Kansas Farmers' Fire Ins. Co. v. Sandon*, 52 Kan. 486; 39 Am. St. Rep. 356, and note; as where the insured property

is situated on the northwest quarter of a certain section instead of the northeast quarter, as described in the policy: *State Ins. Co. v. Schreck*, 27 Neb. 527; 20 Am. St. Rep. 696; or where the misdescription was due to the surveyor's mistake, and did not materially affect the risk: *Farmers' Ins. etc. Co. v. Snyder*, 16 Wend. 481; 30 Am. Dec. 118; monographic note to *Fowler v. Aetna Fire Ins. Co.*, 16 Am. Dec. 468-470.

INSURANCE—CONDITION AS TO OWNERSHIP.—A condition in a fire insurance policy as to the ownership of the property insured is to be understood, not in its technical sense, but as requiring that the insured shall be the actual and substantial owner: *Yost v. McKee*, 179 Pa. St. 381; 57 Am. St. Rep. 604, and note. Thus, possession and exercise of acts of ownership under an executory contract to purchase, and holding the bond of the vendor to make title upon payment in full of the purchase price, satisfies a condition requiring unconditional and sole ownership: *Loventhal v. Home Ins. Co.*, 112 Ala. 108; 57 Am. St. Rep. 17, and note; *Carrigan v. Lycoming Fire Ins. Co.*, 53 Vt. 418; 38 Am. Rep. 687; *Aetna Ins. Co. v. Tyler*, 16 Wend. 385; 30 Am. Dec. 90, and note.

INSURANCE—WARRANTY AS TO VALUE OF PROPERTY.—The general rule is, that an honest overvaluation, arising from a mere error of judgment, and not made intentionally, or with any fraudulent purpose, will not vitiate a contract of insurance: See monographic note to *Borden v. Hingham Mut. Fire Ins. Co.*, 29 Am. Dec. 618, an overvaluation of insured property: *Lynchburg Fire Ins. Co. v. West*, 76 Va. 575; 44 Am. Rep. 177.

BURROWS v. PARKER.

[31 OREGON, 57.]

EXECUTION SALE AND SHERIFF'S DEED—REFORMATION OF.—If one parcel of land is intended to be conveyed to a judgment debtor, but another is actually conveyed to him, and he takes and holds possession of that intended to be conveyed, a levy and sale under execution describing the property according to the conveyance is void, and cannot be perfected, assisted, or reformed in equity.

Olmstead & Courtney, for the appellants.

Butcher & Estham, for the respondent.

58 BEAN, J. In January, 1897, the defendant Parker commenced an action at law against the plaintiffs to recover possession of certain real property in Baker City, and damages for the unlawful detention thereof. The defendants in that action (the plaintiffs here) appeared, and filed an answer, denying specifically all the material allegations of the complaint, and at the same time, as plaintiffs, filed their complaint in equity, setting up and alleging facts which they claim require the interposition of a court of equity, and are material for their defense in the law case. This complaint or cross-bill was stricken out on motion, and the plaintiffs appeal.

By the alleged cross-bill it is averred, substantially, that on the seventeenth day of September, 1888, the Baker City Gas & Electric Light Company, being desirous of obtaining a tract of land upon which to build and construct its proposed gas plant, buildings, machinery and appliances, authorized and empowered the defendant Parker, its president and manager, to purchase a suitable site for that purpose, and to take the deed in his own name, as security for the purchase price which he agreed to advance for the benefit of the corporation. In pursuance of this arrangement, Parker purchased the tract of land in controversy from L. O. Stearns and wife, in September, 1888, paying therefor the sum of one thousand dollars; but by a mutual mistake of the parties, the land actually purchased was not described in the deed to Parker, but the premises purported to be conveyed thereby were situated some two hundred feet south thereof. The gas company, in ignorance of this mistake, immediately ⁵⁰ went into possession of the land actually purchased by Parker, and erected thereon a gas plant, machinery, fixtures, and appliances at an outlay of some twelve thousand dollars, and occupied the same until it surrendered possession thereof to the purchaser at the execution sale on the Basche judgment hereinafter referred to. On November 4, 1890, while the company was in possession of the property, and conducting and operating its plant, P. Basche & Co. recovered a judgment against it for nine hundred and twenty-four dollars and thirty-seven cents, and on June 22, 1893, Balfour, Guthrie & Co. also recovered a judgment for eleven hundred and nine dollars and fifty cents, each of which judgments was duly docketed in the judgment lien docket of Baker county. Thereafter, an attempt was made to sell the property of the gas company under an execution issued on the Basche judgment, but it was described in the notice of sale and order of confirmation the same as in the deed from Stearns to Parker. At this sale, Basche & Co. became the purchasers for the sum of six hundred and fifty dollars, and thereafter Balfour, Guthrie & Co., by virtue of their judgment, redeemed or attempted to redeem, and immediately went into possession of the property, and thereafter received from the sheriff a deed of conveyance in which the same error of description occurred. On February 8, 1895, and while in possession of the property, Balfour, Guthrie & Co. discovered the mistake in the Parker deed, and immediately obtained a deed of correction from the Stearns heirs, and thereafter sold and conveyed the property and appurtenances to the

plaintiffs in this suit for the sum of two thousand dollars. On May 30, 1895, Parker, having in the meantime discovered the error in his deed, brought ⁶⁰ suit against the Stearns heirs (the original grantors having died) to compel a correction of the error in the deed from their ancestors to him, and obtained a decree to that effect in July, 1895. The complaint further alleges that all the money advanced by Parker to purchase the land in controversy from Stearns was repaid to him by the gas company prior to the sale or attempted sale under the Basche judgment, except the sum of one hundred and twenty-five dollars, which the plaintiffs and their predecessors in interest have duly tendered to him, and, by their complaint, offer to pay such amount, or any other sum for which it may be found Parker is entitled to hold the title of the land in controversy as security.

The motion to strike out the cross-bill is based upon two grounds: 1. That the answer in the law case, being a specific denial of every material allegation of the complaint, is, if true, a complete defense at law, and therefore resort cannot be had to equity; and 2. The facts as alleged in the cross-bill do not entitle the plaintiffs to any relief requiring the interposition of a court of equity, and material to their defense in an action at law. As we are all clearly of the opinion that the motion should be sustained upon the second ground, we shall pass, without deciding, the question of practice raised by the first.

The cross-bill is framed, and counsel's argument proceeds on the theory, that while absolute in form, the deed under which Parker claims was intended, and is, as between him and the gas company, a mortgage to secure the payment of money, and that the plaintiffs are the successors in interest of that corporation, ⁶¹ and, as such, are entitled to redeem. They claim this right by virtue of the execution sale on the Basche judgment, but, unless that sale operated to transfer the interest of the gas company in the property in controversy to the purchaser thereat, the plaintiffs have no such right. If Parker holds the title to the property as the mortgagee of the gas company, it probably has a right to redeem from him, but no other person can exercise that right unless as its successor in interest. Now, from the allegations of the bill it appears and is admitted that no attempt was ever made to sell or convey, by sheriff's deed, the property in controversy, or any interest therein; but an entirely different tract of land is described throughout the entire proceedings, and hence the alleged sale is absolutely void, and

conveys no title whatever if it be conceded that an equitable interest in real estate is subject to sale under execution. Nor can a court of equity correct mistakes of this kind in proceedings to enforce judgments at law. The rule of caveat emptor applies with all its rigor to such sales. In the absence of fraud, the buyer must look out for himself. He is presumed to purchase with his eyes open, and with full knowledge of the proceedings upon which the validity of his title must depend. The law requires the performance of certain conditions before the title of one person can be involuntarily transferred to another, and a court of equity has no more power than a court of law to dispense with any of them. This being so, it is manifest that the purchaser at the execution sale under the Basche judgment acquired no title whatever, either legal or equitable, to the property ⁶² in controversy; and, of course, the successor in interest of such purchaser could be in no better position. It follows, therefore, that plaintiffs do not show by their alleged cross-bill such a state of facts as entitles them to redeem from the Parker mortgage, and hence the court did not err in sustaining the motion to strike out the cross-bill.

It follows that the decree of the court below must be affirmed, and it is so ordered.

SHERIFF'S DEEDS—REFORMATION OF INSTRUMENTS.—In a sheriff's deed, the land sold must be described with reasonable certainty: *Jackson v. Delancy*, 13 Johns. 536; 7 Am. Dec. 403; and, failing to do so, the deed is void: *Broughton v. Birchmore*, Harp. 300; 18 Am. Dec. 654; though parol evidence may be admitted to identify the premises intended to be conveyed: *Bates v. Bank of Missouri*, 15 Mo. 309; 55 Am. Dec. 145. One who seeks to have a deed reformed on the ground that it includes land not intended to be conveyed must establish his case by clear, satisfactory, and convincing proof: *Crookston Improvement Co. v. Marshall*, 57 Minn. 333; 47 Am. St. Rep. 612, and note. The reformation of instruments is discussed in the monographic note to *Williams v. Hamilton*, ante, pp. 481-522. It is settled by the great weight of authority that an action to reform a sheriff's deed which has been improperly or defectively executed, cannot be maintained: Extended note to *Bartlett v. Judd*, 78 Am. Dec. 136, 137, on reforming sheriff's deeds.

MINARD v. STILLMAN.

[31 OREGON, 164.]

ATTORNEYS—PRIVILEGED COMMUNICATIONS.—Where an attorney represents all the parties in the settlement and adjustment of a controversy, he will not, in a dispute between them and a third person, be compelled to disclose any communication made to him by any of them while in the exercise of such professional em-

ployment; but in a dispute between his former clients themselves, he is not prohibited from making disclosure of anything communicated in the presence of all concerned or intended for the information of all.

ATTORNEYS—PRIVILEGED COMMUNICATIONS.—Where a controversy arises between an attorney and one of his former clients, he cannot shield himself from testifying on the ground that to do so would be a breach of professional confidence. Hence, where an attorney representing a person having a claim against an insurance corporation admits receiving the amount thereof, and claims to have paid certain portions of the moneys so received by him to various parties, he cannot, in an action against him by his client to recover the moneys thus received, refuse to testify to whom such payments were made, on the ground that it is a matter of professional confidence between himself, his client, and such parties.

Action to recover of the defendant, an attorney at law, a balance claimed to be due from him by the plaintiff as the proceeds of money collected by him of an insurance company. The collection of the moneys by the defendant was admitted by him, but he claimed to have paid them out by the direction of the plaintiff. At the trial, the defendant, as a witness in his own behalf, testified to making payments to various persons of all the moneys received by him, but on cross-examination he refused to give the names of the persons to whom payment was made, claiming that it was a matter of confidence between such parties and the husband of the plaintiff, W. F. Minard, and himself. He admitted that he had not paid any part of the money either to the plaintiff or her husband, and they, in open court, both consented to his testifying fully to whom the payments were made. The defendant declined to testify upon this subject, saying: "I desire to state that I refuse to give that information, for the reason that this money was received and disposed of by me upon a matter of confidence. People that did not want to deal directly, and thought they could not deal safely with W. F. Minard, dealt with me, and the money was paid out. I was acting in confidential relations with the other parties." The court refused to compel the defendant to answer, and allowed judgment to be entered in his favor, from which the plaintiff appealed.

L. Kearney, for the appellant.

John L. Balleray, for respondent.

163 PER CURIAM. The defendant contends that he occupies the position of attorney both for the plaintiff ¹⁶⁷ and the parties to whom he paid this balance; that the payments to such parties are in their nature privileged communications be-

tween attorney and client, and that he ought not to be compelled to make the disclosure. If it be conceded that this is a case wherein an attorney may properly represent all parties concerned in the settlement and adjustment, the rule seems to be well settled that in a controversy between such parties and a third person the attorney will not be compelled, without the consent of the parties, to disclose any communication made to him by them while in the exercise of such professional employment: *Root v. Wright*, 84 N. Y. 72; 38 Am. Rep. 495; *Gruber v. Baker*, 20 Nev. 453. Upon the other hand, the rule is as well settled that in a dispute between parties themselves the attorney is not inhibited from making such disclosures where the communication was made in the presence and hearing of all concerned, or was intended for the mutual information of all: *Micheal v. Foil*, 100 N. C. 178; 6 Am. St. Rep. 577; *Britton v. Lorenz*, 45 N. Y. 51; *Rice v. Rice*, 14 B. Mon. 417; *Carey v. Carey*, 108 N. C. 267; *Hughes v. Boone*, 102 N. C. 137; *Gulick v. Gulick*, 39 N. J. Eq. 516; *Goodwin Gas Stove Co.'s Appeal*, 117 Pa. St. 514; 2 Am. St. Rep. 696; *House v. House*, 61 Mich. 69; 1 Am. St. Rep. 570; *In re Bauer's Estate*, 79 Cal. 304; *Hanlon v. Doherty*, 109 Ind. 37. The reason of the latter rule is stated ¹⁶⁹ in *Rice v. Rice*, 14 B. Mon. 417, which is, in effect, that as the parties are all present at the same time, or are entitled alike to the same knowledge, the matter communicated is not in its nature private, and consequently that, as between the parties, and in so far as they are or can be concerned, it cannot, in any sense, be deemed a subject of confidential communication made by one which the duty of the attorney inhibits him from disclosing to the other. And in conclusion *Simpson, J.*, says: "The statements of parties made in the presence of each other may be proved by their attorneys, as well as by other persons, because such statements are not in their nature confidential, and cannot be regarded as privileged communications."

Now, the case at bar presents a condition of affairs in which there is a dispute between one of the parties and the attorney, and it is contended by the defendant's counsel that the attorney stands in the position of a stranger, and that the rule should be applied as where the controversy is between one of the parties to the communication and a stranger. In this view we cannot concur. If it was a matter of common knowledge between the parties to the settlement as pertains to the persons to whom this balance was paid, the knowledge or the communications

by which it was obtained by all cannot be considered as privileged in so far as the parties are concerned, and the attorney is not inhibited by any duty devolving upon him from communicating such knowledge from one to the other. The knowledge would be matter common to all, the attorney included, and for that reason is not privileged, as it concerns them all. So that in a controversy between ¹⁶⁹ one of the parties and the attorney the communication would be a matter of common knowledge between parties to that controversy, and the reason assigned why it is not privileged as between the parties to the settlement is equally as strong, and has like application as between one of the parties and the attorney. The court was therefore in error in not requiring the defendant to answer. The information which the plaintiff sought to elicit would seem to be pertinent to the issue, which was whether defendant had converted any of this money to his own use. He claims that he paid it to certain parties under the direction of the plaintiff, and it is, therefore, an important factor in the logical course of an examination touching the transaction to ascertain and know to whom it was paid, and was, therefore, proper subject matter respecting which to pursue a cross-examination of the witness. The judgment of the court below will therefore be reversed, and the cause remanded for such other proceedings as may seem pertinent, not inconsistent with this opinion.

ATTORNEY AND CLIENT—PRIVILEGED COMMUNICATIONS—WHAT ARE NOT.—If an attorney acts for several clients, he cannot testify without the consent of all, and this is true as between his clients, or any of them and third parties; but where the controversy is between the parties themselves, the rule does not obtain: *Michael v. Foll*, 100 N. C. 178; 6 Am. St. Rep. 577; *Selp's Estate*, 163 Pa. St. 423; 43 Am. St. Rep. 803; *Hurlburt v. Hurlburt*, 128 N. Y. 420; 26 Am. St. Rep. 482. The attorney may disclose the communications when he has an interest in the matter, or the disclosure is necessary to protect his own personal rights. And he must disclose them where he is not only an attorney but a party, as where summoned as garnishee, he is asked if he has not received money from his client to pay certain debts: Extended note to *Bacon v. Frisbie*, 86 Am. Rep. 633.

THOMPSON v. CONNELL.

[81 OREGON, 281.]

JUDGMENT—FRAUD AS A GROUND FOR A MOTION TO VACATE.—Where the statute authorizes a court to grant relief from a judgment suffered by a party through his mistake, inadvertence, surprise, or excusable neglect, he is entitled to relief, if, by any fraud of his adversary, he was prevented from appearing and answering in due time.

JUDGMENT—RELIEF FROM IN EQUITY AFTER AN UNSUCCESSFUL MOTION IN THE ORIGINAL ACTION.—Where a party against whom a judgment has been entered moves in the original action to have it set aside, and such motion is there denied, he cannot maintain a suit in equity for relief based upon the same grounds, they being, if established by the evidence, sufficient to have warranted the granting of relief on the motion.

W. H. Adams, and Ralph W. Duniway, for the appellant.

Starr, Thomas & Chamberlain and Warren E. Thomas, for the respondent.

²³³ WOLVERTON, J. This is a suit commenced May 30, 1895, to set aside a judgment of the circuit court of Multnomah county obtained by Connell against Thompson in an action at law, and, in the mean time, to restrain the enforcement of the same by execution, which judgment it is alleged was obtained by fraud. The fraud complained of is set forth in substance as follows: That after the commencement of the action the plaintiff therein, who is one of the defendants here, and one Charles Hirstel, with intent to deceive the plaintiff, the defendant therein, and induce him not to employ an attorney in the action, represented that Connell would extend the time for answering until October 2, 1893, and that in the meantime it was contemplated the cause would be settled and plaintiff be discharged from his alleged liability; that plaintiff relied upon the said representations of defendant and said Hirstel, and was thereby induced to and did wait until the day named without employing an attorney or appearing in the cause, but that the defendant, wickedly conspiring to take undue advantage of plaintiff, and to defraud him of his rights in the premises, caused judgment to be given and rendered on October 1, ²³⁴ 1892, against plaintiff, without his knowledge or consent, and contrary to the said understanding and agreement. Subsequently to the rendition of said judgment the plaintiff applied to the circuit court by motion to be relieved against it, and for leave to file an answer therein, and the application was denied. There was a demurrer to the complaint, which was sustained, and the ruling of the court in this regard is assigned as error.

It is contended, in support of the ruling of the court below, that the plaintiff having made application to the court in the law action to set aside the judgment, and the application having been passed upon and denied, he is now precluded from prosecuting a suit in equity for the purpose of annulling the same judgment, based upon grounds identical with those upon

which the application was founded, and we are of the opinion that the contention is sound. The statute has provided that the court may, "in its discretion, and upon such terms as may be just, at any time within one year after notice thereof, relieve a party from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect": Hills' Annotated Laws, sec. 102. It was under this section that defendant made his application to have the judgment vacated, and, although it is not directly alleged in the complaint that the application was based upon the same ground that the plaintiff here relies upon for annulling it, we think it may be fairly implied that such was the case. Indeed, it is the only ground upon which he could claim relief either by the motion or suit, if the allegations of ²³⁵ the complaint are true, and they must be so considered for the purposes of the demurrer. The provision above quoted for relief in the action was adequate for the purpose. True, the grant of such relief rests within the discretion of the court, but the discretion here spoken of is an "impartial discretion, guided and controlled in its exercise by fixed legal principles"; "a legal discretion to be exercised in conformity with the spirit of the law, and in a manner to subserve and not to defeat the ends of substantial justice," and for a manifest abuse thereof it is reviewable by an appellate jurisdiction: *Bailey v. Taaffe*, 29 Cal. 422; 1 Black on Judgments, sec. 354; *Lovejoy v. Wilamette Locks Co.*, 24 Or. 569; *Askren v. Squire*, 29 Or. 228; *Willett v. Millman*, 61 Iowa, 123; *Craig v. Smith*, 65 Mo. 536; *White v. Northwest Stage Co.*, 5 Or. 99.

But it is made a question whether the statute comprehends fraud as a ground for such relief. Whether this is so or not, the ground relied upon for the redress sought is clearly within the statute. The plaintiff complains that the defendant caused the judgment to be given and rendered contrary to their understanding or agreement; and if such was the case he was taken by "surprise," and this is one of the enumerated causes. Mr. Black says: "It is probable that the species of surprise primarily contemplated by these statutes is that which results from the taking of a judgment against a party in violation of an agreement or understanding that the case should be continued or not pressed, or not brought to trial, though that is also a kind of fraud": 1 Black on Judgments, sec. 336, and ²³⁶ Mr. Freeman says: "Fraud practiced in obtaining a judgment is sometimes specified in the statutes as one of the grounds which en-

title an innocent and injured litigant to have it vacated. Even if this were not specially enumerated in the statute, it would generally be available to the injured party on the ground that it had occasioned the rendition of a judgment against him by surprise or mistake, or under circumstances which as to him might well be deemed excusable neglect": 1 Freeman on Judgments, sec. 111 a. Other authorities attest the availability of such a ground of relief by motion to vacate in the original action: See *Binsse v. Barker*, 13 N. J. L. 263; 23 Am. Dec. 720; *Browning v. Roane*, 9 Ark. 354; 50 Am. Dec. 218; *McIntosh v. Commissioners of Crawford Co.*, 13 Kan. 171. So that, in either view, whether the acts complained of are such as may be denominated by one of the statutory appellations, or from their general nature and effect fall within the mischief sought to be relieved against, it is apparent that the statute is broad enough to afford ample relief by motion in the action. We hold, therefore, that the statute having provided the plaintiff with a remedy in the original action, competent for the purpose, and he having there invoked it, he is now precluded from invoking equitable relief of like character based upon grounds identical with those there employed. The tendency of modern legislation and practice has been to greatly abridge the necessity for resort to equity by amplifying and enlarging the remedies in courts of law for many of the exigencies which formerly called for equitable interposition, and, while the jurisdiction may in some instances remain ²³⁷ concurrent with that given at law, it cannot ordinarily be invoked when the remedy at law has been employed either with or without avail: *Reagan v. Fitzgerald*, 75 Cal. 230.

Affirmed.

JUDGMENTS—RELIEF FROM IN EQUITY.—In many, and perhaps all, the states of the Union, statutes have been enacted authorizing courts to vacate or set aside judgments rendered against a litigant through his surprise, mistake, inadvertence, excusable neglect, or for other causes operating to his prejudice by preventing a decision upon the merits: See monographic note to *Furman v. Furman*, 60 Am. St. Rep. 633. Equitable relief may be granted where the successful litigant fraudulently prevents his adversary from presenting his cause of action or defense: See monographic note to *Little Rock etc. Ry. Co. v. Wells*, 54 Am. St. Rep. 236.

JUDGMENTS—RELIEF FROM, AFTER UNSUCCESSFUL MOTION IN ORIGINAL ACTION.—The complainant may have made an appropriate motion for relief in the original action within due time, but the court may have refused to grant it and left him liable to the judgment of which he complains. Generally, the decision of the motion is not deemed *res judicata*, but merely perfects the complainant's right to be heard in equity: See monographic note to *Little Rock etc. Ry. Co. v. Wells*, 54 Am. St. Rep. 251.

FARMERS' LOAN CO. v. OREGON PACIFIC R. R. Co.

[31 OREGON, 237.]

A RECEIVER OF A RAILROAD IS NOT AN AGENT OF EITHER PARTY to the suit, and neither is responsible for his contracts or for his misfeasance or nonfeasance of his office. The liabilities incurred by him are, strictly speaking, the liabilities of the court appointing him.

RECEIVER—LIABILITY OF PLAINTIFF FOR COSTS AND EXPENSES OF.—A plaintiff who commences suit to foreclose a mortgage on a railway, in which a receiver is subsequently appointed, is not liable for wages or other obligations incurred by such receiver, though the proceeds of the property prove insufficient to pay the same.

Application by the employés of the Oregon Pacific Railroad Company for an order requiring the plaintiffs in the suits in which the receivers were appointed to pay the wages of such employés. The suit was brought by the Farmers' Loan & Trust Company as trustee for the bondholders of the railway company to foreclose a mortgage. In this suit, on motion of plaintiff, a receiver was appointed, with authority to operate the road. This receiver was afterward removed, and another appointed in his stead. Under the management of both receivers, the earnings of the road were insufficient to pay the expenses, and a large sum representing wages of employés fell in arrears. Attempts to sell the road under the decree of foreclosure were unsuccessful. The employés therefore resorted to this motion, which was denied, and they thereupon appealed.

George G. Bingham, for the appellants.

H. C. Watson, Turner, McClure & Rolston, and John Rodell Bryson, for the respondent.

243 BEAN, J. This is, so far as we can ascertain, the first recorded instance in the judicial history of railroad receiverships in which the trust fund was insufficient to pay the employés of the receiver engaged in the operation of the road; and hence we are unaided in the determination of the question before us by any judicial decision directly in point. The contention of the petitioners seems to be that a receiver of a railroad appointed in a suit to foreclose a mortgage on the road, and clothed with authority to operate it, is as much the representative of the plaintiff as a sheriff who levies upon property under a writ of attachment, and that the operating expenses incurred by him are costs or fees of the litigation, and, like the fees of the sheriff in the case referred to, are collecti-

ble from the plaintiff. But this argument is based upon an entire misapprehension of a railroad receiver's position and duties. He is not, like a sheriff in an attachment action, the agent of the plaintiff in the litigation, nor does the plaintiff have any control or authority over him whatever. He is agent and executive officer of ²⁴⁴ the court, which, by virtue of its high prerogative powers, lays its judicial hand upon the property which is the subject of controversy and controls and operates it for the use and benefit, not of either of the parties to the litigation, but for the public and whomsoever in the end it may concern. His acts and possession are the acts and possession of the court. His contracts and liabilities in contemplation of law are the contracts and liabilities of the court. The parties to the litigation have not the least authority over him; nor have they any right to determine what liabilities he may or may not incur. His authority is derived solely from the act of the court appointing him, and he is the subject of its order only. "A receiver of a railroad," says Mr. Justice Caldwell, "is a person appointed to receive and preserve the property of a railroad company, and is clothed with authority to operate the railroad and receive the earnings and income therefrom during the pendency of the foreclosure suit. In contemplation of law, the railroad is in the custody of, and operated by, the court appointing the receiver. The receiver is the agent of the court. He is an officer of the court, and his possession of the property is the possession of the court. He is not the agent of either party to the suit, and neither party is responsible for his contracts or for his malfeasance or misfeasance in office. . . . The liabilities incurred by the receiver in the operation of the road are, strictly speaking, the liabilities of the court appointing the receiver": 30 Am. Law Rev. 161. And in Quincy etc. R. R. Co. v. Humphreys, 145 U. S. 82, the court, speaking of the Wabash receivers, said: ²⁴⁵ "They were ministerial officers appointed by the court of chancery to take possession of and preserve, pendente lite, the fund or property in litigation; mere custodians, coming within the rules stated in Union Nat. Bank v. Bank of Kansas City, 136 U. S. 223, 236, where this court said: 'A receiver derives his authority from the act of the court appointing him, and not from the act of the parties at whose suggestion or by whose consent he is appointed; and the utmost effect of his appointment is to put the property from that time into his custody as an officer of the court, for the benefit of the party ultimately proved to be entitled, but not to change the title, or even the right of possession in the property.'"

So, also in the case of *New York etc. R. R. Co. v. New York etc. R. R. Co.*, 58 Fed. Rep. 268, it is said: "Receivers are but officers and agents of the court. While necessarily much is committed to their judgment and discretion, yet their power depends upon the decrees and directions of the courts appointing them. Receiverships of railroad properties are in a large part peculiar appointments. Railroads, as public carriers, are charged with great public duties, and the public are interested that their operation shall be continuous. Creditors are likewise interested that there shall be no cessation in their maintenance as going concerns, because their value as property depends upon the active use of the line." These considerations have developed the present well-settled proposition that such receivers are the mere custodians of the property, and hold for and as mere agents of the court. Speaking of the character of such ²⁴⁶ trustees, and the effect of such holding upon the interests procuring the appointment, Chief Justice Waite said: "The possession taken by the receiver is only that of the court, whose officer he is, and adds nothing to the previously existing title of the mortgagees. He holds, pending the litigation, for the benefit of whomsoever in the end it shall be found to concern, and in the meantime the court proceeds to determine the rights of the parties upon the same principles it would if no change of possession had taken place: *Fosdick v. Schall*, 99 U. S. 251; *Quincy etc. R. R. Co. v. Humphreys*, 145 U. S. 82. A receiver represents no particular interest or class of interests. He holds for the benefit of all who may ultimately show an interest in the property. He stands no more for the creditor than the owner. They are not assignees, and the principles of common law applicable to assignees do not define or determine the character of a receiver's possession, or its effects upon the rights of those interested in the property in their possession. Receivers ought not to be appointed to represent the peculiar interests of one class." To the same effect, see *Texas etc. Ry. Co. v. Rust*, 17 Fed. Rep. 275; *Central Trust Co. v. Wabash etc. R. R. Co.*, 23 Fed. Rep. 863; *Ames v. Union Pac. R. R. Co.* 60 Fed. Rep. 966; *Union Trust Co. v. Illinois Midland R. R. Co.*, 117 U. S. 455.

A railroad receiver is, therefore, more than a mere custodian of the property, like a sheriff holding under a writ of attachment or execution. He is, in effect, the hand of the court which holds the property while it operates the road pending the litigation for the benefit ²⁴⁷ of the general public, as well as the

creditors of the insolvent corporation. It is for this reason that the expenses of the receivership are chargeable as a lien upon the property superior to all other liens. The plaintiff, at whose instance the receiver is appointed, thereby consents to the absolute control and management of the mortgaged property by the court and its agents and to the priority of claims for the expenses incurred in its operation and management; but it is not perceived upon what ground it can be claimed that, because the expenses of the receivership are allowed without any fault of his to exceed the value of the mortgaged property, thus entirely destroying his security, he must, in addition to the loss of his debt, be compelled to make good the deficit, unless the order of appointment was made upon that condition. He has no control over the acts of the receiver, and if, without his consent, he is to be held responsible therefor, he is liable to absolute bankruptcy and ruin. Such a rule would render the plaintiff's position so uncertain and precarious as practically to preclude him from any protection whatever through the appointment of a receiver pending the foreclosure suit. But the inquiry is made, "Shall not a railroad mortgagee who applies for and obtains the appointment of a receiver, with authority to operate the road, be held responsible for the liabilities incurred by such officer when they cannot be made out of the property itself?" We think not, unless such responsibility was imposed as a condition to the appointment or the continuance of the receiver in office. The appointment of a receiver in a suit to foreclose a railroad mortgage is not ²⁴⁸ a matter of strict right, but rests in the sound judicial discretion of the court; and it may, as a condition to issuing the necessary order, impose such terms as may, under the circumstances of the particular case, appear to be reasonable, and, if not acceded to, may refuse to make the order: 30 Am. Law Rev. 161; Fosdick v. Schall, 99 U. S. 235.

If, therefore, upon an application for the appointment of a railroad receiver, it appears probable that the income and corpus will prove insufficient to pay the expenses and liabilities thereof, we have no doubt that the court may require of the plaintiff, as a condition to such appointment, a guaranty of the payment of the expenses of such officer. And if, at any time after the appointment has been made, it becomes apparent to the court that it will be unable to pay and discharge the present or future liabilities incurred by its executive officer and manager, it should refuse to continue the operation of the road un-

der the receiver, unless its expenses are guaranteed. No court is bound or ought to engage or continue in the operation of a railroad or any other enterprise without the ability to promptly discharge its obligations, and, unless it can do so, it should keep out or immediately go out of the business. But, unless such terms are imposed as a condition of the appointment or continuation in office of the receiver, his employes must look to the property in the custody of the court and its income for their compensation. They have no claim whatever on any of the parties to the litigation. They are the employes and servants of the court, and not of the parties. Their wages are in no sense costs of the litigation; ²⁴⁹ and, although incurred during the progress of the suit, they are not incurred in the suit. They are neither expenses of the plaintiff, nor of the defendant, and are not fees or costs which can be charged against the successful party to the litigation, as is sought to be done in this case. It follows that the order appealed from must be affirmed, and it is so ordered.

RECEIVERS—CAPACITY AS AGENTS.—A receiver of property appointed by a court is not an agent. He is an indifferent person holding the property for those ultimately entitled to it, and his possession is that of the court: *Wildberger v. Hartford Fire Ins. Co.*, 72 Miss. 338; 48 Am. St. Rep. 558, and note. He is in a sense the agent of the court appointing him: *Brown v. Warner*, 78 Tex. 543; 22 Am. St. Rep. 67; and in some sense the representative of the owner of the property consigned to him: *Howe v. Harding*, 76 Tex. 17; 18 Am. St. Rep. 17. A receiver of an insolvent corporation is a trustee both for the creditors and stockholders: *Franklin Nat. Bank v. Whitehead*, 149 Ind. 560; 63 Am. St. Rep. 302.

ROSE v. WOLLENBERG.

[31 OREGON, 209.]

STATUTE OF FRAUDS—SURETIES—CONTRACTS BETWEEN.—Agreements between cosureties fixing the respective liability of each are not within the statute of frauds.

Action to recover moneys paid by plaintiff as one of the sureties of V. L. Arrington. The plaintiff and defendant entered into a contract in writing by which they agreed, in the event their principal, V. L. Arrington, did not pay over all moneys that might come into his hands by virtue of his office as county treasurer of Douglas county, that they would pay the sum of thirty thousand dollars. Before the plaintiff's signature to the bond the figures \$10,000 were written. It was claimed by the

plaintiff that, before becoming surety, it was agreed between him and the defendant that the plaintiff should be responsible for one-third and the defendant for two-thirds of any loss that might be sustained by them from such suretyship. The principal defaulted, and each of the sureties paid one-half of the defalcation, and the plaintiff brought this action to recover the difference between such one-half and one-third of the liability. The trial court, after receiving oral evidence supporting plaintiff's theory, nevertheless nonsuited him, and he appealed.

William W. Cardwell and Rufus Mallory, for the appellant.

J. W. Hamilton, for the respondent.

²⁷² WOLVERTON, J. The question presented by this record is, whether the alleged agreement between the plaintiff and defendant "that the liability of plaintiff should be a one-third proportion and that the defendants should be ²⁷³ a two-thirds proportion of any liability that might occur under said bond to said sureties," not having been entered into writing, is within the statute of frauds and perjuries, and therefore void; and, if not, another question arises, and that is whether the evidence presents a prima facie case sufficient to go to the jury. It is settled by *Durbin v. Kuney*, 19 Or. 71, that, as between cosureties, where one of their number has paid more than his proportion of the common liability, no special agreement having been entered into between themselves, the law raises an obligation upon the part of the other cosureties to repay him the excess which he has been compelled to pay, upon the principle that where there is a common liability equality of burden is equity. Formerly, equity alone entertained jurisdiction to compel contribution, but latterly courts of law, having borrowed the jurisdiction, are competent, in most cases, to administer relief. It is said in the case cited "that the doctrine of contribution does not depend upon contract, but is bottomed and founded upon principles of natural justice. The contract upon which they are codebtors or sureties only expresses the relation between them and their creditor, and is entirely distinct from the right of contribution, which exists between themselves." While the law, upon principles of natural justice, raises the obligation of equitable contribution among cosureties, it by no means follows that they are inhibited from fixing or determining their relative liabilities by express contract or agreement among themselves. Indeed, the right to

enter into any agreement ²⁷⁴ in respect of such liability as their discretion or judgment may dictate is not questioned. The important question is, whether such contracts or agreements are within the statute of frauds, requiring all contracts for the debt, default, or miscarriage of another to be contained in some note or memoranda in writing, expressing the consideration, signed by the party to be charged: Hill's Annotated Laws, sec. 785. It is well settled that the true relations existing between joint, or joint and several, promisors or obligors upon a note or bond, or other instrument of writing, can be shown by parol, whether principals or sureties. The writing is paramount, and fixes liability as it pertains to the payee or obligee, but, as between the makers or obligors, their correlative undertakings, whether in the capacity of principals or sureties, may be otherwise established. The principal who has obtained the benefit of the contract, or suffered the forfeiture of his bond or obligation, is always bound to indemnify his surety who has sustained loss upon his account, and he cannot interpose the statute of frauds to prevent it. But when we go a step further, to the proposition which involves the undertaking of one surety to indemnify another, in whole or in part, against liability upon their principal's obligation, or, as is alleged in the case at bar, an agreement between themselves fixing upon a different ratio of liability than that which the law raises or implies, we find much contrariety of opinion and authority as respects the enforcement of such undertaking or agreement where it rests in parol.

The earliest case to which our attention has been called is that of *Thomas v. Cook*, 8 Barn. & C. 727. It ²⁷⁵ there appeared that one person requested another to become surety with him for a third party under promise of indemnity against payment. In deciding it Bayley, J., says: "Here the bond was given to Morris as the creditor, but the promise in question was not made to him. A promise to him would have been to answer for the default of the debtor. But, it being necessary for W. Cook, since deceased, to find sureties, the defendant applied to the plaintiff to join him in the bond and bill of exchange, and undertook to save him harmless. A promise to indemnify does not, as it appears to me, fall within either the words or the policy of the statute of frauds." This was in 1828. In 1839, *Green v. Cresswell*, 10 Ad. & E. 453, was decided by the same court, which may be taken to have overruled *Thomas v. Cook*, 8 Barn. & C. 727, at least the reasoning of that case was severely criticised. The case was this: The plaintiff, at the request of defendant, and

under his promise to indemnify and save him harmless, became surety for one Hadley upon a bail bond in a civil action. The defendant did not join as cosurety. The undertaking was held to be within the statute. The court distinguishes *Thomas v. Cook*, 8 Barn. & C. 727, by reason of the fact that both the plaintiff and defendant therein joined as cosureties. Subsequent authorities have assigned as a reason for the distinction that, where the defendant is cosurety, he is, as such, and without any special promise, liable already to contribute, and thus his special promise to pay the whole may be regarded as but a matter of regulation of contribution between the two sureties. In *Browne on Statute of Frauds*, fourth edition, section 161 a, it is argued that ²⁷⁶ the reason is not well assigned because: 1. That though called 'regulation' or 'contribution,' it is really a promise to pay what he was not otherwise liable to pay for a third party; and 2. That he was never liable to contribute at all except by force of the relation of cosuretyship into which he entered, and owed no antecedent debt of his own." These cases gave rise to the subsequent divergence of opinion on the subject treated therein, and the decisions of courts of different jurisdictions are to be largely distinguished in that they have followed the one or the other of these early authorities. *Reader v. Kingham*, 13 Com. B., N. S., 344, a later English case, decided in 1862, and arising out of a similar state of facts, although not overruling is in direct conflict with *Green v. Cresswell*, 10 Ad. & E. 453. In *Cripps v. Hartnoll*, 4 Best & S. 414, the court would not say that it could lend its support to *Green v. Cresswell*, 10 Ad. & E. 453. But in a much later case, decided in 1874, *Wildes v. Duldow*, L. R. 19 Eq. 198, *Green v. Cresswell*, 10 Ad. & E. 453, was expressly overruled, and *Thomas v. Cook*, 8 Barn. & C. 727, approved and followed. In that case, the son, at the request of his father, became surety for a third party, the father not signing as a cosurety; and it was held to be an original contract for indemnity, and not within the statute of frauds. By a very recent case (*Guild v. Conrad*, (1894), 2 Q. B. Div. 885), it was held that *Green v. Cresswell*, 10 Ad. & E. 453, was no longer binding, but that *Thomas v. Cook*, 8 Barn. & C. 727, was good law. So that it may be said that in England the doctrines have been finally settled in harmony with the latter case.

The authorities among the states of this country ²⁷⁷ are much divided upon the subject. Among the earlier cases to be found is *Chapin v. Merrill*, 4 Wend. 657, decided in 1830. The facts stated are that plaintiff, at the request and upon the solici-

tation of the defendant, and under a promise of indemnity, entered into an undertaking under the seal with one Asa Ransom, by which they covenanted with a mercantile firm that if they would supply one Asa Ransom, Jr., with goods, they, the cosureties, would pay such an amount unpaid by Ransom, Jr., not exceeding two thousand dollars, as should be due the firm. The defendant had no interest in the goods. Marcy, J., in deciding the case, says: "The contract on which this action is brought is not, in my opinion, within the statute of frauds. The action is brought on the parol undertaking of the defendant to save the plaintiff harmless. . . . The promise in this case was original, and not a collateral, undertaking; but had it a sufficient consideration? It is not disclosed that the defendant received any benefit from what was done by the plaintiff, nor is it necessary, as I conceive, that he should to make him liable. In *Tomlinson v. Gill*, 1 Amb. 330, and *Read v. Nash*, 1 Wils. 305, it does not appear that the defendant did or could derive any benefit from their undertakings, yet they were held liable on them. The consideration was the harm to the plaintiffs. In this case the consideration was the assumption of the plaintiff of a responsibility on which he was obliged to pay about six hundred dollars. This is an abundant consideration for the undertaking on which this action is brought." This case was subsequently overruled by the supreme court of New York (*Kingsley v. Balcome*, 4 Barb. 131), which latter was a case wherein ²⁷⁸ plaintiff became bail upon arrest at the request of defendant, who promised to indemnify and save him harmless. The opinion is based to some extent upon the express authority of *Green v. Cresswell*, 10 Ad. & E. 453. In a later case (*Barry v. Ransom*, 12 N. Y. 462), decided in 1855, it was held that a surety who became such upon a tax collector's bond at the request of his cosurety, and under promise of indemnity, could not be required to contribute, the cosurety having paid the whole loss. Denio, J., says: "The cases where the person making the promise was himself bound for the default of the third person are uniform in holding the contract to be unaffected by the statute." Thus distinguishing *Green v. Cresswell*, 10 Ad. & E. 453, and *Kingsley v. Balcome*, 4 Barb. 131, and following *Thomas v. Cook*, 8 Barn. & C. 727, the court concludes: "I am of opinion that where a person is about to become bound by writing to answer for the default of a third party, and he procures another to be bound with him in the same obligation, by promising to indemnify him, this is an original promise, and not within this

branch of the statute of frauds." The same result was reached in a Massachusetts case (*Blake v. Cole*, 22 Pick. 97) based upon a similar state of facts. In a later case from the same state (*Aldrich v. Ames*, 9 Gray, 77) in which the facts are not stated, except that the promise was made for a valuable consideration, Shaw, J., says: "The theory of the statute of frauds is this, that when a third party promises the creditor to pay him a debt due to him from a person named, the effect of such promise is to become a surety or guarantor only, and shall be manifested by written evidence. The promise in such case is to the creditor, not to the debtor. For ²⁷⁹ instance, if A, a debtor, owes a debt to B, and C promises B, the creditor, to pay it, that is a promise to the creditor to pay the debt of A. But in the same case should C, on good consideration, promise A, the debtor, to pay the debt of B and indemnify A from the payment, although one of the results is to pay the debt of B, yet it is not a promise to the creditor to pay the debt of another, but a promise to the debtor to pay his debt. This rule appears to us to be well settled as the true construction of the statute." These earlier cases are sufficient to illustrate the distinguishing features between the prevailing antagonistic opinions in this country.

The leading and perhaps the best considered cases to be found which follow in the wake of *Green v. Cresswell*, 10 Ad. & E. 453, and *Kingsley v. Balcome*, 4 Barb. 131, are *Easter v. White*, 12 Ohio St. 219; *Bissig v. Britton*, 59 Mo. 204; 21 Am. Rep. 379; *Macey v. Childress*, 2 Tenn. Ch. 438, and *Nugent v. Wolfe*, 111 Pa. St. 471; 56 Am. Rep. 291. The Ohio case was decided long prior to the English case of *Wildes v. Dudlow*, L. R. 19 Eq. 198, while the Missouri case was almost concurrent in time with it, but without knowledge of its announcement and was not in any manner controlled by it. The other two cases cite it with disapproval. The clearest illustration of the principle maintained by these cases is to be found in *Nugent v. Wolfe*, 111 Pa. St. 471; 56 Am. Rep. 291. The First National Bank of Ravenna, Ohio, had obtained judgment against Powers and Company. Nugent went security for Powers and Company, as he alleges, at the request of Wolfe, accompanied with a verbal undertaking or agreement to save Nugent harmless in his undertaking for Powers and Company ²⁸⁰ with the bank. The court, in deciding the case, says: "There is no testimony, nor was any offered, to show that defendant had any personal interest in the judgment on which bail was entered, or that he held property or funds that should have been applied to the payment thereof.

So far as appears, it was the proper debt of Powers and Company, and the substance of defendant's agreement is that he would see that they paid it; and, if they failed to do so, he would pay it for them. It was literally a promise to answer for the default of Powers and Company. Plaintiff's liability as bail for stay was merely collateral to the debt in judgment, and had in contemplation nothing but the payment thereof to the bank."

The cases which are usually classed as following *Thomas v. Cook*, 8 Barn. & C. 727, and *Chapin v. Merrill*, 4 Wend. 657, may be subdivided into three classes, in consideration of the grounds upon which each is apparently sustained: 1. It is held that where the inducement for the promise of indemnity is a benefit to the promisor which he did not before or would not otherwise enjoy, as where he has a personal, immediate, and pecuniary interest in the principal transaction, and is therefore himself a party to be benefited by performance on the part of the promisee, the contract is not within the statute and may be supported by a verbal undertaking. In reality the undertaking is to pay a debt which is, in substance, the debt of the promisor: *Smith v. Delaney*, 64 Conn. 264; 42 Am. St. Rep. 181; *Davis v. Patrick*, 141 U. S. 479; *Reed v. Holcomb*, 31 Conn. 360; *Potter v. Brown*, 35 Mich. 274; *Hilliard v. White* (Tex. Civ. App., June 12, 1895), 31 ²⁸¹ S. W. Rep. 553; *Emerson v. Slater*, 22 How. 43. The doctrine established by these authorities does not seem to be at variance with *Green v. Cresswell*, Ad. & E. 453, and *Kingsley v. Balcome*, 4 Barb. 131. See *Waterman v. Resseter*, 45 Ill. App. 155-165. It cannot be true, as has been intimated, that a new and independent consideration, moving from the promisor to the promisee, will support a verbal promise, for this does not meet the statute, as the writing or memorandum which the statute requires must itself be supported by a consideration: See *Mallory v. Gillett*, 21 N. Y. 412. 2. The promise of indemnity is not a contract with the creditor to answer for the default or miscarriage of the debtor, but it is independent of the principal contract or obligation, and constitutes an entirely distinct and separate undertaking, with which the creditor has nothing to do, and which cannot avail him or redound to his benefit in any manner. In such a case, the assumption of the liability by plaintiff is itself a sufficient consideration to support the promise, regardless of any subservient interest of the promisor, or of the fact of his becoming cosurety with the promisee, and it need not be in writing: *Mills v. Brown*, 11 Iowa, 314; *Dunn v. West*, 5 B. Mon. 376; *Lucas v. Chamberlain*, 8 B. Mon. 276;

Holmes v. Knight, 10 N. H. 175; Jones v. Bacon, 72 Hun. 506; 145 N. Y. 446; George v. Hoskins (Ky. March 27, 1895), 30 S. W. Rep. 406; Shook v. Vanmater, 22 Wis. 532; Vogel v. Melms, 31 Wis. 306; 11 Am. Rep. 608; Boyer v. Soules, 105 Mich. 31; Minick v. Huff, 41 Neb. 516; Tighe v. Morrison, 116 N. Y. 270; ²⁸² Wildes v. Dudlow, L. R. 19 Eq. 198; Chapin v. Merrill, 4 Wend. 657. 3. Where the promisee, under the promisor's agreement to indemnify and save harmless, becomes jointly liable as cosurety with him for the same obligor, such an agreement is held to be an original undertaking, and not within the statute. As sustaining this proposition, Thomas v. Cook, 8 Barn. & C. 727, is directly in point. See, also, Horn v. Bray, 51 Ind. 555; 19 Am. Rep. 742; Apgar v. Hiler, 24 N. J. L. 812; Chapeze v. Young, 87 Ky. 476; Adams v. Flannagan, 36 Vt. 400; Baldwin v. Fleming, 90 Ind. 177; Houck v. Graham, 123 Ind. 277; Barry v. Ransom, 12 N. Y. 462; Jones v. Letcher, 13 B. Mon. 363; Oldham v. Broom, 28 Ohio St. 41; Brandt on Suretyship and Guaranty, sec. 226; Mickley v. Stocksleger, 10 Pa. Co. Ct. 345; Blake v. Cole, 22 Pick. 97.

It is within this latter class that the case at bar must be grouped. The authorities have not concurred entirely in the reasoning which is supposed to support the doctrine upon which these cases proceed. Chancellor Cooper, in Macey v. Childress, 2 Tenn. Ch. 438, says they "may be safely rested on the well-established doctrine that a surety may by parol limit the extent of his liability as between him and the other parties to the paper." Mickley v. Stocksleger, 10 Pa. Co. Ct. 345, distinguishes Nugent v. Wolfe, 111 Pa. St. 471, 56 Am. Rep. 291, in that the latter case "was in no way connected with the original cause of action; he was not a party liable, and it did not appear that he had any personal interest in the judgment on which the plaintiff was the only bail for the stay of ²⁸³ execution." Mr. Browne ventures a reason for which he declares that none other exists so satisfactory or consistent with the spirit of the statute. The reason is alike applicable to the second and third classes above enumerated. The troublesome element in the cases is, that by the hypothesis there are or are to be two different persons concurrently liable to the plaintiff to do the same duty. He says: "The implied obligation of the third party exists only by force of and incidental to the special contract between the plaintiff and defendant," and "that the statute contemplates only obligations of the third party previously existing, or incurred contemporaneously with the defendant's special

promise, or afterward as the case may be, but always existing or to exist independently of any contract of guaranty between the plaintiff and defendant; an obligation which exists or may exist, whether any contract be made with the plaintiff and defendant or not; not an obligation which exists only as a legal incident of the contract which they have made." But, seek where you will for a plausible footing upon which to found the obligation so as not to come within the purview of the statute of frauds, the distinction taken in *Green v. Cresswell*, 10 Ad. & E. 453, of *Thomas v. Cook*, 8 Barn. & C. 727, that the promisee became likewise bound upon the obligation with the promisor, as cosureties, and for this reason, if not also for the reason upon which the second class is supported—that it is not an undertaking with the creditor—the indemnity is not within the statute, whether adequate or not, has taken deep hold in the judicial mind, and the undoubted weight of authority in this country is grounded upon it. Indeed ²⁸⁴ the doctrine is even regarded as settled. Mr. Throop, in his treatise on the Validity of Verbal Agreements, sec. 474, says: "As the result of the conflict of authority upon this question (speaking generally of contracts of indemnity against a surety's liability) nothing can be regarded as definitely settled, except, perhaps, that where the promisor and the promisee are about to unite in an instrument as sureties for the third person, the promise to indemnify is not within the statute." If one cosurety can, by a verbal undertaking, indemnify another in whole against the obligation of the latter, without suffering the interdiction of the statute, he may also in part, as the greater includes the less; and thus it is that cosureties may, by contract, agreement, or understanding between themselves, limit and fix the proportion and extent of their several or correlative liability, and it is competent to establish the agreement by parol. So we conclude that it was competent for the plaintiff and defendant to enter into such a contract or agreement as is set forth in plaintiff's complaint, and the fact that it is not in writing cannot be taken as an objection against its enforcement.

Now as to the question whether, in view of the evidence, the court erred in taking the case from the jury and sustaining the motion for nonsuit. Without intimating any opinion as to the weight and effect to be given to the testimony, that being a matter for the jury to determine, and without recapitulation here, let it suffice to say that we deem the evidence introduced competent and sufficient to go to the jury for their consideration

whether or not there was such an agreement ²⁸⁵ entered into between the parties touching thir correlative liabilities as plaintiff has alleged by his complaint: *Tippin v. Ward*, 5 Or. 453; *Brown v. Oregon Lumber Co.*, 24 Or. 317; *Vanbebber v. Plunkett*, 26 Or. 562; *Baldwin v. Fleming*, 90 Ind. 177. Let an order be entered remanding the case for a new trial.

Reversed.

SURETYSHIP — AGREEMENTS BETWEEN COSURETIES—
STATUTE OF FRAUDS.—A contract between sureties to the same instrument, whereby one surety undertakes to indemnify another, is not within the statute of frauds, and may be made by parol: *Horn v. Bray*, 51 Ind. 555; 19 Am. Rep. 742; *Ferrell v. Maxwell*, 28 Ohio St. 383; 22 Am. Rep. 393. Contra, *Bissig v. Britton*, 59 Mo. 204; 21 Am. Rep. 379.

McLENNAN v. McLENNAN.

[31 OREGON, 480.]

MARRIAGE CONTRACTED BY RESIDENTS OF ONE STATE GOING INTO ANOTHER TO AVOID THE LAWS OF THE FORMER.—If the statutes of a state declare that a decree annulling or dissolving a marriage shall terminate it as to both parties, except that neither shall be capable of contracting marriage with a third person until the suit has been heard on appeal, or the time for such appeal has expired, a marriage between a party to such decree and a third person resident of the state, contracted in another state, to which they went for the purpose of solemnizing their marriage, is void in the state of their domicile.

Stephen R. Harrington, for the appellant.

Cicero M. Idleman, attorney general, Charles F. Lord, district attorney, and Thad. S. Potter, for the state.

⁴⁸² **BEAN, J.** On September 3, 1889, the plaintiff was divorced by the circuit court of Multnomah county from her then husband, and, in twenty-two days thereafter, while still a resident of and domiciled in this state, was married in Vancouver, Washington, to the present defendant, who was at the time also a resident and domiciled in Oregon. The plaintiff, being advised that the latter marriage was premature and unlawful, brought this suit to declare it void, which was decided adversely to her, and she brings the cause here by appeal: The sole question presented on the appeal is as to the validity of the Vancouver marriage, and its determination depends upon the construction of section 503 of our statute and its effect upon marriages solemnized in a neighboring state. By this section it is provided that "a decree declaring a marriage void or dissolved

at the suit or claim of either party shall have the effect to terminate such marriage as to both parties, except that neither party shall be capable of contracting marriage with a third person, and if he or she does so contract, shall be liable therefor as if such decree had not been given, until the suit has been heard and determined on appeal, and if no appeal be taken, the expiration of the period allowed by this code to take such appeal." It is clear that a marriage in this state in violation of this section would be null and void, because by its provisions the parties are incapable of entering into such a relation within the time specified for the reason that the decree does not to that extent terminate the former marriage. The ⁴⁸³ statute, in effect, declares that such marriage shall, for that purpose, continue during the time in which an appeal may be taken from the decree, or, in case of an appeal, during the pendency thereof. Until the expiration of such time, the status of the parties, so far as the right to remarry is concerned, remains the same as if no decree had been rendered. For all other purposes the decree is full and complete, but, on grounds of public policy, the legislature has provided that pending an appeal from such decree—if one be taken, and if not during the time in which it may be taken—the parties shall be incapable of contracting marriage with a third person, and under this provision of the law neither of them has any more right to do so than if the decree had not been given. During that time the decree is suspended or inoperative to that extent, and both parties, without regard to their guilt, are utterly powerless to make a valid contract of marriage with a third person.

It will be observed that the statute declares that neither party to the decree shall be capable of contracting marriage with a third person during the time such decree is subject to review by an appellate tribunal, and not merely that it shall not be unlawful for them to do so. It goes directly to their ability or capacity to contract, and there is a distinction made in the books between the marriage of divorced parties declared by law incapable of remarrying and a marriage in violation of some statutory prohibition penal in its nature. In the one case the marriage is absolutely void, and in the other it is often held to be valid, although the party may be punished criminally ⁴⁸⁴ for violating the prohibitory statute. This distinction is very clearly pointed out by Judge Clark in *Conn v. Conn*, 2 Kan. App. 419. The obvious purpose and object of the statute is to enable either party aggrieved by a decree of divorce to have the same reviewed

in an appellate court, and to that end it is provided that, pending such right, neither party shall be capable of doing an act which would render a reversal nugatory. A construction of the statute which would permit a marriage within the time limited would be not only contrary to its plain wording and evident intent, but would produce, in case of a reversal of the decree, the anomalous result of one person having two legal husbands or wives, as the case may be, at the same time, and polygamy be thus sanctioned by law. It was to prevent the confusion and uncertainty resulting from such a condition of affairs that the statute was enacted, and it must be given force and effect. The supreme court of the state of Kansas had occasion in *Wilhite v. Wilhite*, 41 Kan. 154, to construe this statute, and it was there held that a marriage contracted in this state within six months after one of the parties had been divorced from her former husband by a decree of one of the courts of this state (Oregon), was absolutely null and void. The opinion of Mr. Justice Johnston in that case contains a very lucid and satisfactory discussion of this question. The same construction has been given to a similar statute in the state of Washington by the supreme court of that state: *In re Smith's Estate*, 4 Wash. 702.

Indeed, it is not seriously contended that a marriage ⁴⁸⁵ contracted in this state within the prohibited time would be valid, but the contention is, that as the marriage in question was solemnized in the state of Washington, the plaintiff was freed from the restraint imposed upon her by the decree of divorce. The general rule is unquestioned that a marriage between persons *sui juris*, valid where solemnized, is valid everywhere, but this plaintiff having been previously married, and her former husband being alive, could not contract a second valid marriage anywhere, unless the incapacity arising from her previous marriage had been at the time effectively and completely removed by a decree of divorce, and this was not the case at the time of the solemnization of the marriage between plaintiff and defendant, because the statute under which the decree was obtained provided that the divorce did not completely sever the tie of marriage so as to enable either to become a party to a new one until the lapse of a specified time after the decree, and her marriage was contracted in violation of this statute. This provision of the law is an integral part of the decree by which alone both the parties to a divorce proceeding can be relieved from the incapacity to marry, and the marriage by a person divorced in this state and domiciled here, in violation of its provisions, is a mere nullity when called in question in the courts of this state, although such

marriage may have been contracted in another state: 1 Nelson on Divorce, sec. 135; 1 Bishop on Marriage and Divorce, sec. 436; Warter v. Warter, L. R. 15 P. D. 152; Chichester v. Mure, 3 Swab. & T. 223. The rule announced in the case of Commonwealth v. Lane, ⁴⁸⁶ 113 Mass. 458, 18 Am. Rep. 509, and Van Voorhis v. Brintnall, 86 N. Y. 18, 40 Am. Rep. 505, and other cases cited of similar import, is relied upon by the defense. The doctrine of these cases is that a statute prohibiting a marriage of the guilty party in a divorce proceeding, during the lifetime of the other, or except under certain conditions, does not render void the marriage of such person out of the jurisdiction of the state in which the decree was obtained. Upon this question there is some conflict in the authorities [Pennegar v. State, 87 Tenn. 244; 10 Am. St. Rep. 648; 5 Am. & Eng. Ency. of Law, 1st ed., 841], but the obvious distinction between the question presented in the cases referred to and in the case at bar is that there the incapacity to remarry attached only to the guilty party. The decree of divorce absolutely terminated the marriage relation between the parties as effectually as if it had been dissolved by death. The innocent party was perfectly free to remarry at any time, and the restraint upon the other was imposed as a punishment, and was, therefore, penal in its nature, and, as such, held inoperative out of the jurisdiction where it was inflicted. The provision of our statute is not imposed as a punishment, nor is it penal in its character, but it applies to the innocent as well as the guilty; it goes to the capacity of either party to remarry within the prescribed time, and therefore the cases cited and the doctrine contended for have no application to the question in hand. We are clear, therefore, that plaintiff's marriage, having been contracted before the expiration of the time allowed by law in which to appeal from a ⁴⁸⁷ decree of divorce, is absolutely void, and the decree of the court below must be reversed, and it is so ordered.

MARRIAGE AND DIVORCE—VALIDITY OF MARRIAGE IN FOREIGN JURISDICTION TO EVADE LOCAL LAWS.—The rule established by the great weight of authority undoubtedly is, that a marriage good and valid by the laws of the state or country where it is entered into, is valid in every other state or country, although it appears that the parties thereto went into another state or country to contract such marriage with an express view to evade the laws of their own country, the marriage in the foreign country or state must nevertheless be held valid in the country from which they departed for the purpose of marrying, and to which they returned to live: See monographic note to State v. Shattuck, 60 Am. St. Rep. 941, 942. Compare Estate of Stull, 183 Pa. St. 625; 63 Am. St. Rep. 776, and note.

HANDLEY v. JACKSON.

[81 OREGON, 552.]

RELIEF FROM A JUDGMENT WILL BE DECREED IN EQUITY upon there appearing any fact clearly proving that it is against conscience to execute the judgment, and that the injured party could not have availed himself of this fact in the court of law, or if he could have so availed himself, that he was prevented from doing so by fraud or accident unmixed with any fault or negligence in himself or his agents.

JUDGMENTS.—RELIEF WILL NOT BE GRANTED IN EQUITY against a judgment at law, unless some meritorious and sufficient defense exists to the action at law or to some substantial part thereof.

A JUDGMENT BASED ON AN UNAUTHORIZED APPEARANCE OF ATTORNEY will be relieved against in equity, and the want of authority on the part of the attorney may be proved by parol. This rule is equally applicable whether the attorney be responsible or not, and whether or not he acted by the procurement or collusion of the adverse party.

JUDGMENT.—THE RATIFICATION OF A JUDGMENT BASED ON AN UNAUTHORIZED APPEARANCE of an attorney does not result from an offer to pay a lesser sum in full satisfaction, such offer being rejected.

A JUDGMENT FOR OR AGAINST ONE DEFENDANT cannot be res judicata for or against another where they are entitled to, and demand, separate trials, or where for some other reason one of them is not a party to a judgment, or is entitled to relief from a judgment against himself and the other.

Thomas H. Tongue, for the appellants.

J. E. Magers and James McCain, for the respondent.

553 WOLVERTON, J. Charles Handley seeks to restrain the sale of certain real property of his situate in Yamhill county, about to be sold under and by virtue of an execution issued out of the circuit court of the state of Oregon for Washington county upon a judgment therein given and rendered in an action at law in favor of the defendant Ellen L. Jackson, and against plaintiff and one T. B. Handley. The action was upon a joint and several promissory note executed by the said Charles and T. B. Handley to W. R. Jackson, who indorsed the same to Ellen L. Jackson, the defendant herein and plaintiff in said action. The present bill alleges that Ellen L. Jackson held said promissory note in trust for W. R. Jackson by voluntary indorsement and transfer without consideration; that she began said action against this plaintiff and T. B. Handley, but that no summons was ever served upon this plaintiff, and that he never had any notice or knowledge whatever of the pendency thereof, or that the same had been instituted, until long after the rendition of judgment

therein; that said T. B. Handley, who is an attorney of said court, appeared in said action as the attorney for plaintiff, but that such appearance was wholly unauthorized by plaintiff, and without his knowledge, direction, or consent. It is also alleged that the note had been fully paid and discharged prior to the commencement of said action. A journal ⁵⁵⁴ entry in the original action overruling a demurrer recites that the plaintiff appeared therein by attorney and this is the only finding of the court touching his appearance in the action disclosed by the record. The decree being for plaintiff, defendants appeal.

1. The principal contention of defendants is, that inasmuch as this suit was not instituted for the express purpose of annulling, correcting, or modifying such judgment, the attack thereon is collateral; and hence, being the judgment of a court of general jurisdiction, it was incompetent to impeach, by evidence dehors the record, the finding of said court that the defendant had appeared by attorney, which involves the presumption that the court also and necessarily found that the attorney had the requisite authority to enter such appearance. There was some controversy at the argument touching the nature of the suit in this regard, and it may be considered as collateral under the generally accepted definition of a collateral attack, but it is not necessary for us to determine the ⁵⁵⁵ question here. Let it suffice to say that there is a well-established and clearly defined equitable jurisdiction which will enable courts of equity to restrain the enforcement of an unconscionable judgment or decree procured through fraud, or through some unavoidable accident, or excusable mistake of the defendant in the action or suit. Mr. Pomeroy, under title, "To restrain actions or judgments at law," states the doctrine as follows: "That where the legal judgment was obtained or entered through fraud, mistake, or accident, or where the defendant in the action, having a valid legal defense on the merits, was prevented in any manner from maintaining it by fraud, mistake, or accident, and there had been no negligence, laches, or other fault on his part, or on the part of his agents, then a court of equity will interfere at his suit and restrain proceedings on the judgment which cannot be conscientiously enforced": 3 Pomeroy's Equity Jurisprudence, sec. 1364. Chief Justice Marshall recognizes it in the following language: "It may safely be said that any fact which clearly proves it to be against conscience to execute a judgment, and of which the injured party could not have availed himself in a court of law, or which he might have availed himself at law, but was

prevented by fraud or accident, unmixed with any fault or negligence in himself or his agents, will justify an application to a court of chancery": *Marine Ins. Co. v. Hodgson*, 7 Cranch, 332, 336. And in further support thereof, see *Hendrickson v. Hinckley*, 17 How. 443; *Brown v. Buena Vista County*, 95 U. S. 157; *Crim v. Handley*, 94 U. S. 652; *Phillips v. Negley*, 117 U. S. 666; ⁵⁵⁶ *Wagner v. Shank*, 59 Md. 313; *Given's Appeal*, 121 Pa. St. 260; 6 Am. St. Rep. 795; *Tomkins v. Tomkins*, 11 N. J. Eq. 512; *Bryant v. Williams*, 21 Iowa, 329. Mr. Freeman says: "The judgment complained of is permitted to stand, and the court of equity merely inquires whether there are any equitable circumstances requiring it to prevent the person in whose favor the judgment was recovered from enforcing or taking advantage of it": See elaborate and well-considered note to *Morrill v. Morrill*, 20 Or. 96; 23 Am. St. Rep. 95-117; 2 Freeman on Judgments, sec. 485; also, *Martin v. Parsons*, 49 Cal. 94. So that, with this understanding of the jurisdiction and its exercise, it can make no appreciable difference whether such a suit be regarded as a direct or collateral attack upon the judgment.

2. In general, the party invoking the jurisdiction must not only show some adequate ground of interference with the judgment, but must also disclose a meritorious and sufficient defense to the law action, or at least to some substantial part or portion thereof: *Piggott v. Addicks*, 5 G. Greene, 428; 56 Am. Dec. 547; *Dunklin v. Wilson*, 64 Ala. 162; *Taggart v. Wood*, 20 Iowa, 236; *Sauer v. Kansas*, 69 Mo. 46; *Reeves v. Cooper*, 12 N. J. Eq. 223; *Stokes v. Knarr*, 11 Wis. 389; *Colson v. Leitch*, 110 Ill. 504; *Tomkins v. Tomkins*, 11 N. J. Eq. 512; *Parsons v. Nutting*, 45 Iowa, 404; *Harnish v. Bramer*, 71 Cal. 155. Although some authorities maintain that, where judgment has been entered without service of process, and no jurisdiction having been acquired over the person, appropriate relief will be granted without inquiry ⁵⁵⁷ touching the merits of the original claim: *Bowen v. Allen*, 113 Ill. 54; 55 Am. Rep. 398; *Great West Min. Co. v. Woodmas Min. Co.*, 12 Colo. 46; 13 Am. St. Rep. 204. But, however this may be, the allegations of the complaint herein bring the plaintiff fairly within the requirements of the generally accepted rule above stated.

3. It is perfectly competent in such a proceeding to hear evidence aliunde, offered for the especial purpose of negating or overcoming the presumption of authority in the attorney to enter the appearance of an unserved defendant whom it is sought to conclude by the record: *Weeks on Attorneys at Law*, sec. 202;

Harshey v. Blackmarr, 20 Iowa, 161; 89 Am. Dec. 520; *Bryant v. Williams*, 21 Iowa, 329; *Shelton v. Tiffin*, 6 How. 163.

4. The rule formerly obtained in England, and in some of the states of the Union, that an appearance by an attorney for a party without his sanction or authority was deemed sufficient for the court, which would look no further, but would proceed, and leave the party to his remedy against the attorney, unless he was irresponsible, or his appearance was through procurement or collusion with the adverse party: *Latuch v. Pasherante*, 1 Salk. 86; *Denton v. Noyes*, 6 Johns. 296; 5 Am. Dec. 237; *Bunton v. Lyford*, 37 N. H. 512; 75 Am. Dec. 144. However, the rule in nearly, if not all, those jurisdictions has latterly been much qualified and disabused of its ancient rigor. But by the current of the more modern authorities it has been discarded as void of sound reason for its support. Judge Dillon in *Harshey v. Blackmarr*, 20 Iowa, ⁵⁵⁹ 161, 89 Am. Dec. 520, very ably demonstrates the injustice of the rule. He says: "It obliges a person to be bound by the unauthorized act of a mere stranger. It binds him by a judgment of a court without a day in court. It relieves the other party of a duty which, in reason, belongs to him, viz., to serve his process, and to see, at his peril, that his adversary is in court. And it carries out this unsoundness by compelling the wrong party to look to the attorney. True, reason and logic would say, if an attorney appeared for me without my knowledge or authority, express or implied, I should not be bound by the act if never ratified or promptly disavowed, and if the adverse party, being ignorant of the want of authority, and carelessly omitting to serve process or to require the attorney to show his authority, has been damaged, he, and not myself, should be the one to look to the attorney." The inexorable logic of this great jurist has had its effect, so that there is now no longer any doubt but that the enforcement of a judgment obtained and resting upon the unauthorized appearance of an attorney, for a party not served may be restrained in equity, irrespective of the question whether the attorney is responsible or irresponsible, or acted by procurement or collusion with his antagonist: *Parsons v. Nutting*, 45 Iowa, 404; *Newcomb v. Dewey*, 27 Iowa, 381. As to whether such a judgment is void, or voidable only, it is not within the scope of the case at bar for us to determine. It is sufficient for the present purposes that it is either.

5. The evidence is strong and clear that T. B. Handley appeared in the action for Charles Handley, ⁵⁵⁹ and, having so

appeared, filed a separate answer in his behalf, without his knowledge or consent, and that no service of summons was ever had upon the latter. Indeed, Charles Handley had no knowledge whatever that the action had been commenced, or of the judgment having been obtained and entered against him, until notified some ten or twelve days thereafter by the attorney for Mrs. Jackson. True, Handley made a conditional offer to pay a stated sum in full satisfaction of the judgment and costs, when so notified; but this was not accepted, and an execution was at once issued. The offer, unaccepted, was not a ratification of the judgment rendered against him under the unauthorized appearance. The suit to enjoin was commenced before the condition of any of the parties had changed, and there was no laches or lack of diligence in the plaintiff herein in ascertaining his rights and asserting them when fully understood.

As it pertains to the remaining facts in the case, the court below found that Ellen L. Jackson was the holder of the note sued on in the Washington circuit court in trust for W. R. Jackson, and that the same had been fully paid, satisfied, and discharged prior to the commencement of the action thereon; and we believe, after a careful consideration of all the evidence, that these findings are supported by the proof. These considerations affirm the decree of the court below, and it is so ordered.

Affirmed.

ON REHEARING.

500 WOLVERTON, J. 6. Since filing the opinion in this case the defendants filed a motion for rehearing based upon a question alluded to in the argument of counsel, but not discussed in the briefs, and it is now insisted that it is vital, and ought to be settled. It is claimed that the judgment in the case of Jackson against T. B. and Charles Handley is res adjudicata and binding upon Charles Handley, even though he did not appear in the action, because the payments which it is alleged discharged the obligation were made by T. B. Handley; that is to say, that Charles Handley, by claiming the benefit of such contractual relations between T. B. Handley and Jackson, thereby puts himself in privity of contract with T. B. Handley, and that the judgment, being conclusive upon T. B. Handley, operates with like effect against Charles. It will be remembered that the action against T. B. and Charles Handley was upon a joint and several promissory note, and was a case in which a several judgment could have been entered. If both had been

served, T. B. might have, if he so desired, permitted judgment to have gone against him by default, and, if so, it could not have been claimed that the default judgment was *res adjudicata* as to Charles. Now, would the case have been different if T. B. had been first served, and trial had upon the very ground which Charles Handley now insists discharged the obligation, and Charles had subsequently been brought in, and sought to resist payment by an interposition of the same defense? We think it can hardly be so claimed. In *Eikenberry v. Edwards*, 71 Iowa, 82, 56 Am. Rep. 360, a case of some analogy, several parties were sued, and, having severed at the trial, one of them prevailed. Subsequently, in a trial against another, it was sought to conclude the plaintiff by the former judgment. But the court, speaking through Rothrock, J., said: "It would be a novelty in the law of former adjudication if a defendant in an action can procure a separate trial as to the issues between him and the plaintiff, and then claim that the trial between the plaintiff and another defendant was an adjudication as to him." As bearing somewhat on the question, see, also, *Smith v. Ballantyne*, 10 Paige, 101; *Coleman v. Hunt*, 77 Wis. 263. It is a fundamental principle that a judgment can only conclude parties and their privies. In so far as it respects the judgment in the case of Jackson against the Handleys, it stands as though Charles had never been made a party or appeared in the action. And the pretended judgment actually entered against T. B. Handley, under the circumstances of the case, could have no more binding force and effect upon Charles than if one had been entered without making him a party in the first instance, as each was entitled to his day in court, and to contest Jackson's right of recovery. No privity of contract can exist between codefendants thus situated. Motion denied.

Rehearing denied.

JUDGMENTS—RELIEF FROM, IN EQUITY—SHOWING OF MERITS.—It is not sufficient, in a suit for relief against a judgment or other decision, to show that it was procured by fraud, or was due to surprise, mistake, accident, or some other ground of interposition in equity, if the defendant has suffered no injury from it, or if the same decision must have resulted had there been a trial on the merits. In every bill seeking relief against a judgment, merits on the part of the complainant must be shown to justify the interposition of equity: See monographic note to *Little Rock etc. Ry. Co. v. Wells*, 54 Am. St. Rep. 222.

JUDGMENTS—EQUITABLE RELIEF FROM—UNAUTHORIZED APPEARANCE OF ATTORNEY.—It is now almost universally conceded that a court of equity will interpose in behalf of one against whom a judgment at law has been rendered upon the un-

authorized appearance of an attorney in his behalf, and generally without making any inquiry respecting the solvency or insolvency of the attorney: See monographic note to Little Rock etc. Ry. Co. v. Wells, 54 Am. St. Rep. 247.

JUDGMENTS—RES JUDICATA—CODEFENDANTS.—To make a matter *res judicata*, there must be identity of the subject matter of the suit, of the cause of action, of the persons and parties, and of the quality in the persons for or against whom the claim is made: *Benz v. Hines*, 3 Kan. 890; 89 Am. Dec. 594, and note; *Slocumb v. De Lizardi*, 21 La. Ann. 355; 99 Am. Dec. 740; extended note to *Doty v. Brown*, 53 Am. Dec. 855; extended note to *Lawrence v. Hunt*, 25 Am. Dec. 542-544; *State v. Branch*, 134 Mo. 592; 56 Am. St. Rep. 533. Where one of two defendants makes an issue with the plaintiff, a judgment settling the issue so made in favor of the defendant does not determine the issue between the codefendants: *Jones v. Vert*, 121 Ind. 140; 16 Am. St. Rep. 379, and note.

CASES
IN THE
SUPREME COURT
OF
PENNSYLVANIA.

KANE v. CHESTER TRACTION COMPANY.

[186 PENNSYLVANIA STATE, 145.]

RELEASE OF CLAIM FOR DAMAGES—ATTEMPT TO AVOID FOR FRAUD IN ITS PROCUREMENT.—One having a claim of damages for personal injuries received through the negligence of a railway corporation, which he is induced to settle for an amount much less than claimed, cannot avoid such settlement on the ground that it was procured by the false representations of an agent of the corporation that if he went to law he would get nothing, because the judge was a stockholder in the corporation, and it would buy up the jury, the witnesses, and even the claimant's own attorneys.

A RELEASE OF A CLAIM FOR DAMAGES for personal injuries cannot be avoided on the ground that it subsequently appears that they were more serious than apprehended at the time of the settlement.

Action to recover for personal injuries arising from the alleged negligence of the defendant corporation. It relied upon a release executed by the plaintiff which she, in turn, sought to avoid on the ground that it was procured by fraudulent representations of the defendant's agent. Before the release was obtained the plaintiff was represented by an attorney and the action had been commenced, but the attorney was not consulted in the settlement, nor was he advised of the negotiations preceding or the representations which were claimed to have brought it about. The trial judge charged the jury that the evidence of fraud was insufficient to relieve the plaintiff from the operation of the release, and that the verdict should be given for the defendant. Verdict and judgment accordingly, and the plaintiff appealed.

Thad. L. Vanderslice, Charles L. Smythe, Garratt E. Smedley, and Christopher H. Murray, for the appellant.

W. B. Broomall, for the appellee.

¹⁴⁸ MITCHELL, J. The plaintiff, being met with a formal release under seal, endeavored to avoid its effect by showing that it was obtained from her by fraudulent representations made to her by the agent of defendant, and by another person professedly acting as her friend and adviser, but whom she now charges to have been in the interest of defendant. The latter charge seems to have been as unfounded as it was ungrateful, but the judge having taken the case away from the jury, we must for the present treat it as if it were true. We must look, therefore, to ¹⁴⁹ the evidence of the alleged fraud, and, as a preliminary, to the admitted facts. The plaintiff having been injured in a collision on the defendant's railway, negotiations for settlement ensued which ran over a period of several weeks, if not months, and finally ended in the payment by the defendant of an amount based on the wages the plaintiff might have earned up to that time, plus an allowance to her mother for care in nursing her, and the assumption by the defendant of the doctor's bills. Plaintiff, of her own motion, brought in a neighbor named McClenachan as adviser, and the testimony of all the witnesses is that the negotiations were conducted at arm's length, the plaintiff starting with a claim of one thousand dollars, and the company with an offer of one hundred dollars, the sole point of difference apparently being the amount of compensation. At the meeting at which an agreement was finally reached, there were present the plaintiff, her mother, and her friend and adviser, McClenachan, on one side, and MacFayden, the company's agent, on the other. The amount to be paid was agreed upon, an order on the treasurer given, and the next day the money was drawn by the mother on plaintiff's own indorsement of the check.

So far the facts are undisputed, but plaintiff charges that she was induced to accept the amount and execute the release by the fraudulent representations of MacFayden, the company's agent, assented to, if not actively participated in, by her supposed friend McClenachan, that if she went to law she would get nothing; that the judge was a stockholder in the traction company, and that the latter would buy up the jury, the witnesses, and even her lawyers. The fact of such representations having been made was flatly denied, but for the present we must assume that the jury might have found that they were. Conceding this, the only item of the array that comes up to the requirement of an existing fact, as ground of relief by reason of fraudulent representations, is that the judge was a stockholder

in the company defendant. This is admittedly without any foundation, but there is no clear testimony on the part of the plaintiff that this falsely alleged fact was the inducement to execute the release. On the contrary, her own testimony shows quite plainly that whatever reluctance she had to accept the sum offered was due to her desire to get more, and her subsequent dissatisfaction arose from her belief that she ought to have got more, and that her injuries were greater than she at that time thought. This is no ground for avoiding the settlement: *Seeley v. Citizens Traction Co.*, 179 Pa. St. 334.

In view of the flimsy nature of the alleged misrepresentations, so little calculated to affect the judgment of any person of common sense, the evidence as to the specific facts alleged ought to be clear and at least fairly convincing. But it is not. The whole story is vague and indefinite, and far below the grade requisite to set aside a formal instrument whose execution is admitted. It is quite probable that defendant's agent was not over nice in his mode of urging the delays and disadvantages of a lawsuit and the small amount the plaintiff might actually receive even out of a substantial verdict. His methods may have been over-zealous, but they are not shown to have amounted to fraud. If plaintiff had been a merchant selling goods, and the defendant a purchaser depreciating their value in the dicker, we could not say that the latter had exceeded the license allowed him by the standard of commercial honesty, and there is no reason to hold the present parties to any stricter rule. The case is by no means so strong as *Pennsylvania R. R. Co. v. Shay*, 82 Pa. St. 198, or *Wojciechowski v. Spreckels Sugar Refining Co.*, 177 Pa. St. 57.

Judgment affirmed.

RELEASE OF CLAIM FOR DAMAGES—RIGHT TO WITHDRAW FROM.—Where a compromise, release, and discharge of a disputed liability for personal injuries has been deliberately entered into between the parties, it should not be canceled or set aside by a court of equity except upon the most satisfactory proof. For cases in which the proof has been held not satisfactory or sufficient to show fraud or excusable mistake or ignorance of rights, see monographic note to *Alabama etc. Ry. Co. v. Jones*, 55 Am. St. Rep. 507-512.

McHUGH v. McHUGH.

[186 PENNSYLVANIA STATE, 197.]

EVIDENCE—PRESUMPTION FROM SUPPRESSION OR ATTEMPT TO CORRUPT.—Though the defendant has not testified, evidence may be received showing that at a former trial of the same cause he attempted to procure a witness to testify falsely, and also sought to have a third person corrupt the jurors. This is but an application of the rule that a spoliation of papers and a destruction or withholding of evidence which a party ought to produce gives rise to a presumption unfavorable to him, as his conduct may properly be attributed to his supposed knowledge that the truth would operate against him.

EXECUTOR OR ADMINISTRATOR—MISCONDUCT OF, DURING A TRIAL.—Though the defendant is an administrator or executor, his misconduct at a trial in attempting to suborn witnesses or to corrupt jurors may be proved in evidence against him.

Everett Warren, John F. Scragg, and F. J. Fitzsimmons, for the appellant.

John P. Kelly and John R. Edwards, for the appellee.

²⁰¹ **FELL, J.** Three of the specifications of error relate to the admission of testimony to show that the defendant, before a former trial of the same issue, had attempted to procure false testimony and corruptly to influence the jurors. The action was to revive a judgment obtained against the defendant's deceased husband, of whose will she was executrix. The defense was accord and satisfaction. In rebuttal, the plaintiff offered to prove by two witnesses that, before the first trial, the defendant had attempted to induce them to appear as witnesses for her and to testify falsely; and to prove by a third witness that the defendant had attempted to induce him to corrupt the jurors. These offers were sustained, and the witnesses were allowed to testify. The defendant had not testified at either trial.

The spoliation of papers and the destruction or withholding of evidence which a party ought to produce gives rise to a presumption unfavorable to him, as his conduct may properly be attributed to his supposed knowledge that the truth would operate against him. This principle has been applied in a great variety of cases, and it is now so well established that it is unnecessary to do more than state it. A somewhat extreme illustration of its application is found in *Brown v. Schock*, 77 Pa. St. 471, where the failure of a party to an action to appear at the trial, when he had a strong motive to appear, was said to be evidence against him. Those who have had experience in the trial of causes will assent to the statement of Thompson, C. J., in

the opinion in *Frick v. Barbour*, 64 Pa. St. 120: "The testimony ²⁰² of a case often consists in what is not proved as well as in what is proved."

A like presumption arises where, in connection with the trial, testimony has been fabricated or witnesses suborned or a jury corruptly influenced, or where an attempt has been made to do any of these things. The conduct of the party may then be attributed to his knowledge that his cause was an unjust one. This rule is suggested in 1 *Taylor on Evidence*, section 116, and in 1 *Greenleaf on Evidence*, fifteenth edition, sections 37 and 196, and thus stated in 2 *Wharton on Evidence*, third edition, section 1265: "Proof of the forgery of false testimony is admissible against the party by whom the fabrication is made. The same presumption is drawn against all forms of attempted suppression of or tampering with evidence or subornation of witnesses." And in *Best on Evidence*, section 411: "If it be shown that a plaintiff has been suborning false testimony, and has endeavored to have recourse to perjury, it is strong evidence that he knew perfectly well that his cause was an unrighteous one."

It is surprising that there are so few cases upon the subject, but there are some very high authorities upon the exact point raised. *Moriarty v. London etc. Ry. Co.*, L. R. 5 Q. B. 314, was an action by a husband and wife against a railroad company for personal injuries to the wife caused by negligence. Evidence was admitted that the husband, who was not a witness, had offered to share with witnesses the compensation in the event of a recovery of damages. A rule for a new trial was made absolute on the ground of surprise, but it was held that the testimony was properly admitted. It was said by Cockburn, C. J.: "I think this rule ought to be discharged so far as the ground taken that the evidence was improperly admitted. The conduct of a party to a cause may be of the highest importance in determining whether the cause of action in which he is plaintiff, or the ground of defense, if he is defendant, is honest and just; just as it is evidence against a prisoner that he has said one thing at one time and another at another, as showing that the recourse to falsehood leads fairly to an inference of guilt. Anything from which such an inference can be drawn is cogent and important evidence with a view to the issue. So, if you can show that a plaintiff has been suborning ²⁰³ false testimony, and has endeavored to have recourse to perjury, it is strong evidence that he knew perfectly well his cause was an

unrighteous one." In *Egan v. Bowker*, 5 Allen, 449, it was held that it was competent to prove that a party to action had suborned a witness to swear falsely in a deposition taken in relation to the case, although the deposition had not been put in evidence by either party at the trial. The decision rests on the ground that a party would not support a fair claim by falsehood, and that when he has been guilty of fraud in the maintenance of the action, proof of the fraud is competent as an admission of the fraudulent nature of the claim. This case was approved in *Hastings v. Stetson*, 130 Mass. 76, in which testimony was admitted to show that the adverse party had attempted to bribe a juror at a former trial of the cause. In *Chicago City Ry. Co. v. McMahon*, 103 Ill. 485, 42 Am. Rep. 29, an action for injuries resulting from negligence, a witness in the case was allowed to testify that he had been offered money by a clerk in the employ of the corporation defendant not to appear, or to influence his testimony. In *Snell v. Bray*, 56 Wis. 156, letters written by a party to third persons, warning them not to aid the other party by testifying or otherwise, and urging them to testify to a particular state of facts, were admitted, and it was said to be immaterial that they had been written before the action was commenced, if written after the controversy had arisen. To the same effect is the case of *Winchell v. Edwards*, 57 Ill. 41. In *Heslop v. Heslop*, 82 Pa. St. 537, it was held not to be error to receive testimony to show the participation of the defendant in an attempt to corrupt the plaintiff's witnesses; but it was said that the presumption arising from the misconduct of the party would not justify the jury in utterly disregarding the testimony which he had produced in support of this defense, although it should admonish them carefully to scrutinize it.

In some of these cases the reason given for the admission of the testimony is that it is an admission by conduct, and in others that it gives rise to a presumption, but the decisions all rest on the ground that evidence of the misconduct of a party in connection with the trial is admissible as tending to show that the party guilty of the misconduct is unwilling to rely on the truth of his cause, or is conscious that it is an unjust one. The effect of such testimony may be to impeach witnesses by proof of misconduct with which they have had no connection, but the testimony of a witness is never exempt from scrutiny. The cause may be discredited while the witness is not, for an entirely honest piece of testimony may be part of a dishonest claim or defense.

It did not help the defendant's position in objection to the testimony that she was defending as executrix, and acting in a representative capacity. As a beneficiary under her husband's will she was in fact largely interested in the result of the litigation. But the effect of her conduct was the same whether she was acting for herself or for another. The same ground of objection to the admission of testimony to show an attempt to corrupt witnesses was taken in *Moriarty v. London etc. Ry. Co.*, L. R. 5, Q. B. 314, and it was said by Lush, J.: "I also think no distinction can be made with reference to the character of the party suing; whether it is a representative character, or he is suing to enforce some right of his own. Either way the inference which the evidence tends to raise is the same, that the case is not a true one, and on that ground the evidence is receivable."

There is nothing in the other assignments which need be considered. If there was any defect in the manner in which the defendant was brought upon the record, her voluntary appearance cured it.

The judgment is affirmed.

EVIDENCE—FAILURE TO PRODUCE TESTIMONY—PRESUMPTION.—Omission to produce material testimony within one's power raises a presumption that it would be adverse: *Danner v. South Carolina R. R. Co.*, 4 Rich. 329; 55 Am. Dec. 678. The silence of a party to an action, charged with a damaging fact brought out in evidence, is not an admission of its truthfulness. It simply creates an unfavorable presumption against him: *Enos v. St. Paul etc. Ins. Co.*, 4 S. Dak. 639; 46 Am. St Rep. 796.

COMMONWEALTH v. GOODWIN.

[186 PENNSYLVANIA STATE, 218.]

EVIDENCE—ARTIFICE IN OBTAINING CONFESSIONS DOES NOT RENDER THEM INADMISSIBLE.—Hence if a person accused of murder requests an interview with a girl charged with complicity with him, and, on such interview being granted, two deputy sheriffs are concealed so as to hear what was said, their testimony as well as that of the girl is admissible.

EVIDENCE—CONFESSIONS.—A LETTER GIVEN BY A PRISONER to the sheriff, to be delivered to a third person, but retained by the sheriff, is admissible in evidence against the writer, if it contains statements amounting to admissions of his guilt.

While the defendant and Gertrude Taylor were in prison charged with the murder of his wife, he requested an interview with his codefendant. This being granted, two deputy sheriffs

were concealed in the room, and the defendant, not knowing of their presence, made statements which were testified to in court by the deputies and the woman. The defendant also wrote a letter to the same woman, and requested the sheriff to deliver it. This letter was also received in evidence against the prisoner. His counsel objected to the reception both of the letter and of the testimony of the woman and the deputy sheriffs. The objections were overruled, and the defendant, being convicted, appealed.

David Cameron and Jerome B. Niles, for the appellant.

George W. Merrick and Andrew B. Dunsmore, for the appellee.

²²¹ MITCHELL, J. The assignments of error are based on the refusal to strike out the testimony of Gertrude Taylor, and of the two deputy sheriffs, as to what the prisoner said in the interview with the girl, and on the admission of the prisoner's letter to her. The only objection is, that the commonwealth obtained the evidence ²²² by an artifice which the prisoner did not anticipate or suspect. There is nothing substantial in this argument. The means by which the commonwealth obtains its evidence must vary with the circumstances of each case. In dealing with crime, nicety of method and considerations of delicacy must often give way to necessity. If the rule were otherwise, the testimony of accomplices, and even of detectives, would seldom be admissible, and crime which works in the dark would go unpunished.

The conversation between the prisoner and Gertrude Taylor was of an incriminating character, amounting practically to a confession, and we may concede that its admissibility is to be determined by the same rule. If it had been accidentally overheard, or his letter had been carelessly dropped by her and found by the sheriff, there could have been no objection to the use of them by the commonwealth. But there is nothing in the circumstances to produce a different result. The prisoner has no right to object unless the evidence was cajoled or forced from him by inducements or threats from those whose authority over him would make their promises or threats equivalent to duress. There was no such element here. Both the interview and the letter were the prisoner's voluntary act on his own initiative, and for his own purpose. Neither his hopes nor his fears were raised by any act of the sheriff. In *Commonwealth v. Smith*, 119 Mass. 305, the prisoner, a girl of fourteen, made a confession to the officers who had her in custody. The judge at the trial

ruled that "mere fear on the part of the defendant did not render the confession incompetent unless induced by some improper conduct on the part of the officers," and this was affirmed, the court saying: "To avoid the effect of this confession, the hope or fear which led the defendant to confess facts unfavorable to her must be induced by the threats, promises, or conduct of the officers." And in Wharton on Criminal Evidence, section 644, it is said, citing cases: "Nor is it fatal to the admissibility of such a letter that it was in answer to a letter meant as a trap."

• "Though it is necessary to the admissibility of a confession that it should have been voluntarily made, that is, that it should have been made without the appliances of hope or fear from persons having authority; yet it is not necessary that it should have been the prisoner's own spontaneous act. It will be ²²³ received, though it were induced by spiritual exhortations, whether of a clergyman or of any other person; or by a solemn promise of secrecy even confirmed by an oath; . . . or by any deception practiced on the prisoner, or false representation made to him for that purpose, provided there is no reason to suppose that the inducement held out was calculated to produce any untrue confession, which is the main point to be considered": 1 Greenleaf on Evidence, par. 229. "A confession procured by artifice is not for that reason inadmissible unless the artifice used was calculated to produce an untrue confession": 3 Am. & Eng. Ency. of Law, tit. Confessions, sec. 5. The subject was very carefully considered in a noted case somewhat analogous to the present: Commonwealth v. Hanlon, 8 Phila. 423. The prisoner there, being charged with murder, was put in the same cell with a criminal named Dunn, for the purpose of obtaining, if possible, evidence to convict. At the trial, Dunn's testimony as to a confession made by the prisoner was admitted, and upon it the latter was convicted and executed. The trial was presided over by a judge of great experience in criminal cases, the late Judge Ludlow, assisted by Judge Brewster, and in the former's opinion refusing a new trial, he states that the result of their examination of the subject was concurred in by their colleagues, the late president Judge Allison and Judge Paxson, subsequently chief justice of this court. The rule as stated by these authorities is far stronger than is required to sustain the present case.

In regard to the admission of the prisoner's letter, we have an authority directly in point in Rex v. Derrington, 2 Car. & P. 418. A prisoner gave a letter to a turnkey under promise that it should be posted, but the turnkey gave it to the prosecutor.

Baron Garrow held that it was admissible, saying the only cases where what a prisoner says or writes is not evidence are. 1. "Where he is induced to make any confession in consequence of the prosecutor, etc., holding out any threat or promise to induce him to confess; and 2. Where the communication is privileged as being made to his counsel or attorney."

By the well-settled rules, therefore, the evidence was properly received.

Judgment affirmed and record remitted for purpose of execution.

EVIDENCE—CONFESSIONS OBTAINED BY ARTIFICE—ADMISSIBILITY.—A confession is admissible in evidence, notwithstanding the fact that it has been obtained from the accused by a resort to artifice, deception, or falsehood. However reprehensible and dishonorable such means of obtaining a confession may be, yet if the confession is shown to have been voluntary, and not to have been made by reason of inducements that would be likely to lead the accused to make an untrue confession, it will be admitted in evidence against him: See monographic note to *Daniels v. State*, 6 Am. St. Rep. 249, on the admission of confessions in evidence.

DESHONG v. DESHONG.

[186 PENNSYLVANIA STATE, 227.]

CONVEYANCE — WHEN DOES NOT INCLUDE THE WHOLE INTEREST OF THE GRANTOR.—A conveyance of an estate for life of the party of the first part in and to the undivided one-third part belonging to the party of the second part of all the real estate of which J. O. died seised in his demesne and of fee, does not include the life estate of the grantor in the property which she did not acquire from J. O.

A PARTITION UNDER THE INTESTATE LAWS MUST INCLUDE ALL the realty of which the parties are seised as cotenants.

PARTITION OF ESTATES IN REMAINDER cannot be compelled unless specially authorized by statute. In Pennsylvania, however, an act of the legislature provides that a partition may be had notwithstanding there may be a life estate in a part of the property with remainders in fee subject to the rights of the life tenants.

O. B. Dickinson, for the appellant.

W. B. Broomall, for the appellee.

229 MITCHELL, J. John O. Deshong, Sr., devised to his widow, Emmeline, for her life, what I will call for convenience, tract A, his homestead; to his son Alfred, the plaintiff, for life, tract B; and to his son John O., Jr., the residue, which included the remainders in fee after the life estates in tracts A and B. John O. Deshong, Jr., died intestate, unmarried and without is-

sue, leaving his mother, Emmeline, a brother, Alfred, the plaintiff, another brother Clarence, and a sister, Mrs. Woodbridge, the appellant. The mother, Emmeline, by deed released and conveyed an undivided one-third of her life estate in the lands which she had thus derived from her son, John O., Jr., to each of her sons, Alfred and Clarence. It will be observed that the widow, upon the death of her son, John O., Jr., had two life estates in tract A, one in possession under her husband's will, and one in remainder as heir to her son. As the latter was in remainder after her previous estate and both being for her own life, it would practically have merged or rather coalesced, had she not released two-thirds of it to her two surviving sons. It is claimed by appellee that these releases were of her whole interest, and included both life estates. In support of this it is argued that the release being of "all the estate for life of the party of the first part in all and to all the undivided third part belonging to the party of the second part, of all the real estate of which John O. Deshong, Jr., died seised in his demesne as of fee," and as John O., Jr., was seised in fee in remainder of tract A, the release must include all the widow's interest in that tract. The word "seisin," it was urged, though in its primary sense meaning possession, yet frequently has an enlarged signification, meaning any present ownership of a freehold estate. It may be conceded that the word is frequently used in such enlarged sense, but it is quite clear that the grantor did not so use it in the present case. It is not the accurate sense of the word, and there can be no presumption that it was not used accurately. On the contrary, the circumstances point the other way. The widow was in possession of the homestead for her life under her husband's will when she became heir for life to her son John O., Jr., who held the fee in the residue of the estate, including a remainder in the homestead. John O., Jr., had no seisin or title which could have disturbed her possession, ²³⁰ and when she released to her sons the undivided two-thirds in the estate which had been John's, there is nothing to indicate that she meant to give them any more right to disturb her possession of the homestead than John had in his lifetime. What she granted was what she had got from him. The full life estate which she had from her husband's will she clearly meant to retain.

At the issue of the writ therefore the title stood thus: "1. In the widow a life estate in tract A, under her husband's will, and a life estate in an undivided third of the residue as heir to her son John O., Jr.; 2. In plaintiff a life estate in tract B; a re-

remainder in fee in an undivided third of the same tract; a like remainder in tract A after the widow's life estate; and a fee in possession in an undivided third of the residue; 3. In Clarence a fee in remainder of an undivided third in tracts A and B after the respective life estates of his mother and Alfred therein; and a fee in possession in an undivided third of the residue; 4. In Mrs. Woodbridge, appellant, a fee in remainder of an undivided third of the whole estate, after the respective life estates of her mother in tract A and in one-third of the residue, and of Alfred in tract B."

The plaintiff issued his writ of partition against his brother, his sister, and his mother. The latter, however, was only made party as the holder of a life estate in an undivided third of the residue. Tract A was not included in the writ or the declaration. Nor did plaintiff include tract B in which he held a present life estate and a remainder in fee in an undivided third. Appellant, one of the defendants, pleaded *inter alia* that the lands described, *et cetera*, were not all the lands of which the parties were seized," etc.

It appears that this is a good plea. In *Rex v. Rex*, 3 Serg. & R. 533, it was said by Duncan, J., that "under proceedings founded on the intestate laws it is incumbent on the petitioner to bring the whole real estate before the court. There cannot be several inquisitions of it by parcels," for then the inquest could not accommodate the children with as many portions of the whole estate as it might be capable of accommodating them with, and the right of election might be unfairly used. This view was ²³¹ followed by our late brother Clark in *Everhart v. Shoemaker*, 42 Leg. Int. 480. "Where a partition is to be enforced by legal process, it is essential that the whole tract embraced by the cotenancy should be included": 17 Am. & Eng. Ency. of Law, 752, tit. Partition, III, 10 b.

The original plea was in general terms that the lands declared for were not all the lands, *et cetera*, but appellant subsequently filed an additional plea setting out the failure to include tracts A and B. On both these pleas the plaintiff joined issue.

The question thus raised is, so far as we are advised, new. No precedent was cited by either side, nor have I been able to find any in such independent research as the pressure of other business has permitted. Under the statutes of 31 Henry VIII, chapter 1, and 32 Henry VIII, chapter 32, which are the foundation of the modern law on the subject, there was no partition of estates in remainder. Being a possessory action, if there was no present

right of possession there was no case for partition: Freeman on Partition, sec. 440, and cases there cited. The outstanding life estates in tracts A and B would therefore have prevented the remainder men from including them in the present suit. But the act of April 11, 1835 (Pub. Laws, 199), provided that writs of partition may be sued and the same proceedings had, "notwithstanding there may be a life estate in part or parts of the property with remainders over in fee." But such proceedings shall not interfere with the possession of any life tenant entitled to the exclusive possession of any part of the premises, unless with his consent. But proceedings "may be had subject to such possession, or such part of the premises may remain undivided during the existence of the life estate, unless otherwise disposed of by the agreement of parties." This statute appears to have been very little before the courts, and its construction is still open upon the points which arise in the present case. At whose option shall the choice be made whether partition shall be had subject to the life tenant's possession, or such part be left undivided during the existence of the life estate? And further, while it is clear that no adverse proceeding without his consent could interfere with plaintiff's possession of tract B under his life estate, so long as he was only a life tenant, yet it may be open to question how far he could himself omit it in asking partition of the rest of the estate, without infringing on the ²³² rule already referred to, that all the real estate must be brought into one proceeding if practicable, and the question is further complicated by the fact that he is not a mere life tenant, but the holder of a fee in an undivided third in remainder after his own life estate. These questions arise in the case, and will probably have to be determined before its final decision, but the course of the trial prevented them from being specifically made there, and they have not been argued by counsel here. As the judgment must be reversed upon another ground, we therefore leave them for the present open.

In regard to tract A, the same question would arise at the issue of the writ—How should it be determined whether to include it subject to the life estate, or to leave it undivided until the death of the life tenant? The latter, by her plea, consented that partition should be made of the premises in the writ, but the homestead was not included, and whether or not she would consent as to it could not appear. Before the trial, however, the widow died, and thereby these questions as to tract A became immaterial. It then belonged in fee and in possession to the plain-

tiff and the two remaining defendants, in common, and there was no longer any reason why it should not be included in the proceedings. The learned judge was therefore in error in holding that her death made no difference in the proceeding, and the continuance asked by the appellant should have been granted. It would have been more regular if the appellant, after the suggestion of the death of the widow, had filed a formal plea puis darrein continuance, setting forth the fact that tract A was now held in common by the remaining parties and should be included in the proceeding. But even without this, it now plainly appeared by the admitted facts that appellant's special plea as to tract A was good in substance, and therefore the direction to the jury to find for the plaintiff was an error. As the case stood at the close of the evidence the verdict should have been directed for the appellant on her special plea as to tract A. Whether plaintiff can cure this defect in his proceeding by amendment or new assignment we do not at present express any opinion about, but it is clear that without such amendment he cannot get on at all, and the verdict must be for the defendants. Even with this amendment the questions as to tract B will still remain.

Judgment reversed and venire de novo awarded.

DEEDS—CONSTRUCTION—REFERENCE TO PRIOR CONVEYANCES.—A prior conveyance referred to in a deed for a description of the premises may be resorted to, and will furnish the description: See monographic note to *Heaton v. Hodges*, 30 Am. Dec. 742. Thus if a conveyance purport to be of land conveyed by a prior deed to which reference is made, the grantees cannot contend that more passed than was included within the recited deed: *Phillips v. Porter*, 3 Ark. 18; 36 Am. Dec. 448. Compare *Hines v. Robinson*, 57 Me. 324; 99 Am. Dec. 772.

PARTITION OF ESTATES IN REMAINDER.—It is well settled that in the absence of statutory provisions to the contrary, partition will not be awarded, either at law or in equity, of an estate held in remainder or reversion. Statutes in some of the states have altered this rule: See monographic note to *Aydlett v. Pendleton*, 32 Am. St. Rep. 778-782, especially discussing this question: *Jameson v. Hayward*, 106 Cal. 682; 46 Am. St. Rep. 268. See *Carneal v. Lynch*, 91 Va. 114; 50 Am. St. Rep. 819.

CHESTNUT STREET NATIONAL BANK v. FIDELITY INSURANCE, TRUST, AND SAFE DEPOSIT COMPANY.

[186 PENNSYLVANIA STATE, 333.]

TRUSTS—WHEN TESTAMENTARY AND THEREFORE REVOCABLE.—A deed conveying property to be held in trust to pay the grantor during life the income and to sell and invest as he may direct, and after his death, to convey to such of his sons as may be living and to the issue of such as have died, is revocable by the grantor, because it is testamentary in character. Especially is this true when the grantor is a woman, and her attention is not called to the fact that the deed contained no clause of revocation, nor to the desirability of inserting such a clause.

CONVEYANCES—WHEN TWO MAY BE REGARDED AS ONE.—If a trust deed is executed, and afterward a further deed is made modifying and changing some of the terms of the former, the two should thereafter be regarded as one instrument, and a clause of the donor's will confirming the first should not be construed as revoking the second, but as confirming the first as modified by the second.

SPENDTHRIFT TRUSTS.—A provision in a deed of trust in favor of the donor's children that the share of one of them shall be held in trust for his use and benefit, and that neither the income nor the principal shall under any circumstances be subject to anticipation or assignment by him, or to seizure or attachment under any judgment, decree, or other lawful process at the suit of any creditor he has or may have, is valid, and no part may be taken under a writ in favor of his creditors.

Demurrer to answers to certain interrogatories in proceedings under an attachment execution. Helen A. Bryant, in February, 1885, executed a conveyance to the Fidelity Insurance Trust and Safe Deposit Company of certain securities to be held in trust, to collect and receive the income, and pay it quarterly to the grantor during her life, and to sell such securities as she should request and invest the proceeds thereof in other securities as she should direct, and to pay over the income to her during her natural life, and to assign and transfer such property as might be in the custody of the company at her death to such of her sons, Walter, Willis, and Henry as might be living at her death, or to the lawful issue of such as had died. Two years later in February, 1887, she executed another deed of trust to the same grantee, reciting the former deed and that it was the desire of the parties thereto to change the appropriation of the estate after her death, and purporting to modify the first trust deed so that the one-third share which would have come to her son Willis should be so held that no part of the principal or income should, under any circumstances, be subject to anticipation or assignment by him or to attachment or seizure under any judgment,

decree, or other legal process at the suit of any of his creditors, and that, in the event of any attempted anticipation, seizure, or attachment, his right in the income should instantly cease and become the property of his wife and children, if any he should have. In February, 1889, Mrs. Bryant made a will purporting to confirm the trust deed which she executed in February, 1885, but stating that, as it did not in any manner provide for her daughter Josephine, she directed that such daughter should have an amount of the securities equal in share received by each of her sons. In 1896, Mrs. Bryant died, and an attempt was made to subject the share of her son Willis to an execution against him. The garnishee set up the facts in his answer. The answer was demurred to and a judgment entered in favor of the plaintiff, from which an appeal was taken.

P. F. Rothermel, Jr., for the appellee.

John Hampton Barnes, for the appellee.

239 GREEN, J. It was conceded by the learned court below, and we think it must be regarded as settled law that the writings in question in this controversy must be considered as being of a testamentary character, and therefore as revocable instruments. In *Frederick's Appeal*, 52 Pa. St. 338, 91 Am. Dec. 159, the settler executed a deed of trust by which the income of the property conveyed was to be paid to himself during life, and the principal was to be divided among his nine children after his death. By another deed subsequently executed he revoked the first deed of trust and made a will leaving all his property to two of the nine children. In the litigation which resulted the lower court awarded the fund to the trustee for the nine children, but on appeal to this court the judgment was reversed. Woodward, C. J., delivering the opinion said: "Now on the part of the appellant it is maintained that the deed was a mere power of attorney, an instrument of agency, and therefore revocable at pleasure, whilst upon the part of the appellees it is regarded as a voluntary trust on behalf of the children fully executed by a legal conveyance and therefore to be supported in equity. . . . We are of opinion that the deed in question here was made for the grantor's own personal convenience, that the trustees were to account to him for all they did under the powers vested in them, and that no beneficial interest was to vest in his children until after his death. A disposition of property to take effect after the grantor's death is testamentary, and therefore revocable." The

same doctrine was enforced in *Rick's Appeal*, 105 Pa. St. 528, where the deed of trust was made by a woman seventy-five years of age to her brother for all her property, in trust for her maintenance and support during her life, and upon her death to be divided among certain beneficiaries. Afterward she executed a deed ³⁴⁰ of revocation and filed a bill in equity against the trustee for a reconveyance to her of her estate. This court held that the deed of trust was revocable because it was a purely voluntary conveyance, intended merely to promote the convenience and protect the interest of the grantor, and because the rights of third parties did not intervene, the provisions for the benefit of third parties, which were not to take effect until the grantor's death, being either testamentary, and hence revocable, or covenants for posthumous gifts, and hence without consideration.

In the present case these considerations appear to be directly applicable. During the life of Mrs. Bryant, the settler, the entire income of the trust was to be paid to her, and the deed must be deemed to have been made for her own personal convenience and advantage. No other interests arose during her life, and none were to accrue until after her death. There was no clause of revocation in the deed, and her attention was not called to the fact of the omission of such a clause, nor to the desirability of its insertion in case she should wish to make a provision for the protection of any of her sons against possible creditors. We think the case comes within the doctrine, so well expressed and carefully considered, in the leading case of *Russell's Appeal*, 75 Pa. St. 269, where the absence of a power of revocation was held to be sufficient, in connection with the other facts of the case, to warrant a decree setting aside a deed of trust on the ground of mistake. It cannot be doubted in the present case that the settler, had she been advised of the necessity of a provision to protect her son's interest against the demands of creditors, would have insisted upon the insertion of such a provision in the body of the deed.

But it is not necessary to extend the discussion of this branch of the case, because it is scarcely in controversy, and the learned court below held that the second deed made by the grantor, being of a testamentary character, was a good and valid revocation and change of the trust as established by the first deed. The court held that under the authorities all the instruments must be regarded as of a testamentary character, and that because the testatrix in her last will expressly confirmed the first deed made in February, 1885, she must be considered as having revoked thereby the provisions of the second deed.

We are unable to agree with this conclusion. The will was ³⁴¹executed on November 19, 1889. At that time her son, Willis L. Bryant, had become indebted to the Chestnut Street National Bank in a sum so large that, on December 17th following, the bank recovered a judgment against him for the sum of thirteen thousand four hundred and fifty-eight dollars and seventy-five cents. The second deed of trust was made on February 21, 1887, and the very object of making it was to protect the share of this particular son, Willis L. Bryant, against the claims of any creditors of his, so that in no event could they acquire any part of his share, either of principal or income. It is instructive and convincing to quote in this connection the language of the second deed, to wit: "And as to the remaining one-third part of the corpus of the said estate, to hold the same for the use and benefit of her son, Willis L. Bryant, so however that neither the income nor principal shall ever under any circumstances be subject to anticipation or assignment by him, or to attachment or seizure under any judgment, decree, or other legal process, at the suit of any creditor he now has or ever may have. And in the event of any attempt at anticipation, assignment, seizure, or attachment, the right on his part to receive said income shall instantly cease and shall become the property of his wife and children, if any he have, or, failing marriage or issue, shall go to and become the property of his brother or brothers who shall be living at the time; and upon the further trust" to pay over the principal at the death of Willis L. Bryant to his children, or, failing children, to his brothers or their children. It must be further observed that this second deed contained a recital of the first deed and its provisions, and then expressed the desire of all the parties to change it in the manner immediately thereafter described, and at the end thereof there was inserted the following provision: "In all other respects the said indenture of February 11, 1885, is hereby expressly ratified and declared to be of binding and continuing effect."

This second deed was a tripartite deed between Ellen A. Bryant, the grantor, of the first part, the Fidelity Insurance Trust and Safe Deposit Company, the grantee and trustee, of the second part, and the three sons, ultimate beneficiaries, of the third part. It follows that the complete transaction, after the execution of the second deed, consisted of the two deeds, taken together and explanatory of each other, the first one being ratified and confirmed in the second in all respects except ³⁴²as to the change made by the second. They could not there-

after be regarded as two separate, distinct, and independent instruments, but as a combined whole, intended and designed to become operative together. It follows that when the testatrix, at a still later date, November 19, 1889, executed her last will and testament, and therein repeated almost word for word the very provision in favor of her son, Willis L. Bryant, and protecting his share against any possible creditors, present or future, as was contained in the second deed of trust, she fully intended him to have the same interest and protection as was given by the second deed. It is perfectly manifest that when she said in the third clause of the will, "I confirm the deed of trust which I executed to the Fidelity Insurance, Trust and Safe Deposit Company on the eleventh day of February, 1885," she absolutely intended to confirm it as it was effected by the second deed, the two being parts of one whole. This is most manifest from the language of the fifth clause of the will wherein she expressly repeats the provision contained in the second deed in favor of her son, Willis L. Bryant, and protecting his interest against his creditors. Even if the confirmatory words of the third clause and the words of the fifth clause are to be regarded as inconsistent with each other, the last expression of the will would have to be regarded as the controlling one, and would prevail against the first. But we do not regard them as inconsistent with each other, and therefore cannot attribute to the confirmatory words of the third clause of the effect of revoking the provision of the second deed in favor of the son Willis.

It is also manifest from the remaining words of the third clause next after the confirmatory words at the beginning of it that the testatrix did not mean that the first deed of trust was to prevail against the will, because those words expressly provide for another change in the effect of the first deed. They make provision for the daughter Mrs. Rothermel, that she shall have a share equal to the shares of the sons under the deed of trust. In every point of view we regard the will as not in antagonism with either of the deeds of trust, but rather as confirmatory of the effect of both when considered as one whole. The assignments of error are all sustained.

The judgment of the court below is reversed, and judgment is now entered against the plaintiff and in favor of the garnishee upon the answers filed, with costs.

TRUSTS—POWER OF REVOCATION.—A purely voluntary trust deed, intended to promote the convenience and protect the interests of the grantor, and passing no present interest to third per-

sons, may be revoked at will, although it contains no power of revocation. If such deed provides for the benefit of third persons, to take effect after the grantor's death, such provisions are testamentary and revocable, or may be regarded as covenants for posthumous gifts, and, as such, without consideration: See monographic note to *Bristor v. Tasker*, 20 Am. St. Rep. 862, on the power to revoke deeds of trust.

TRUSTS—SPENDTHRIFT—VALIDITY.—In Pennsylvania, there is no doubt that a testator may devise property in trust with directions to his trustee to pay the income to designated beneficiaries during their lives, and exempt the interest of the beneficiaries from seizure under attachment, execution, or otherwise: *Ghormley v. Smith*, 139 Pa. St. 584; 23 Am. St. Rep. 215. For a discussion of the American cases on this question, see monographic notes to *Garland v. Garland*, 24 Am. St. Rep. 686-697, and *Smith v. Towers*, 9 Am. St. Rep. 405-408.

CONEMAUGH GAS CO. v. JACKSON FARM GAS CO.

[186 PENNSYLVANIA ST. 443.]

EQUITY JURISDICTION MAY BE SUSTAINED upon the ground that it affords the most convenient remedy.

SPECIFIC PERFORMANCE OF A CONTRACT TO SUPPLY NATURAL GAS may be decreed by a court of equity.

CONTRACT—PUBLIC POLICY.—A contract by one gas company for supplying natural gas to another, to be sold to the latter's customers, is not against public policy nor in any respect unlawful.

CONTRACT.—THE DEFENSE OF THE UNLAWFUL ACT OF THE PARTY INTERPOSING IT is not favored. Hence, if the defendant seeks to avoid the specific performance of a contract on the ground that it is against public policy, he must clearly show such to be the case.

Suit to enforce a contract alleged to have been made by the Jackson Farm Company with the Conemaugh Company to supply the former company with natural gas. Misunderstanding and contention between the two companies arose respecting the amount of gas furnished by the one to the other, and this resulted in the refusal of the defendant company to supply any more gas and the commencement of this suit to enforce the rights of the plaintiff. So far as the issues of fact were involved, the referee to whom the case was referred found in favor of the complainant, and his findings were sustained by the trial court. The defendant thereafter appealed.

J. S. Ferguson and James C. Boyce, for the appellant.

A. Leo Weil and Charles M. Thorp, for the appellee.

454 McCOLLUM, J. The assignments of error from the first to the tenth, inclusive, are based upon and call in question the correctness of the referee's findings of fact. Presumably, the

findings were authorized by the evidence, and the presumption that they were is strengthened by the clear, concise, and obviously impartial report in which they appear, and by the approval of the report by the court, after full argument upon and due consideration of the exceptions to it. A careful reading of the voluminous testimony in the case having satisfied us that the findings referred to were clearly warranted by it, an elaborate discussion of it is not called for. It is shown by many decisions of this court that the party complaining of the verdict of a jury or the findings of a master, auditor, or referee, as unauthorized by the evidence, must specify the deficiencies in it and show that it is legally insufficient to sustain the verdict or findings of which complaint is made. In the case at bar, a strenuous effort was made to convince us of error in the findings referred to, but it was unsuccessful because, as we have seen, they were sustained by the evidence.

The referee's conclusions of law appear to be applicable to, and in conformity with, the facts as found, and the alleged errors in them are mainly predicated upon the alleged errors in his findings of fact. To the extent that this contention is dependent upon errors in the findings of fact it needs no consideration, because it is only an indirect method of attacking them after a direct assault has proved fruitless.

The defendant's printed argument is mainly devoted to the support of the proposition that the case is not within the jurisdiction of a court of equity, and that if it is technically cognizable there, the evidence should have induced the chancellor to dismiss the plaintiff's bill, and thus referred the parties to another tribunal for an adjustment of their disputes. We do not assent to this view of the case. There is certainly no reasonable ground for denying that in view of the nature and subject matter of the controversy a court of equity affords the ⁴⁵⁵ most convenient remedy for a just disposition of the questions involved in it, while the remedy afforded by a court of law is obviously inconvenient, and the adequacy of it is at least doubtful. In *Appeal of Brush Electric Co.*, 114 Pa. St. 574, Mr. Justice Gordon said: "A bill may be sustained solely on the ground that it is the most convenient remedy." In support of this statement he cited *Kirkpatrick v. McDonald*, 11 Pa. St. 393. See, also, on this point, *Drake v. Lacoe*, 157 Pa. St. 17, and *Warner v. McMullin*, 131 Pa. St. 370. The cases of *Whiteman v. Fayette Fuel Gas Co.*, 139 Pa. St. 492, and *Sewickley Borough School Dist. v. Ohio Valley Gas Co.*, 154 Pa. St. 539, are also in point.

We do not concur in the argument or suggestion that the contract between the parties is against public policy, and therefore the defendant company should be relieved from its liability for what is justly due the plaintiff upon it. In the first place, it has not been shown that the contract is violative of any provision of the law applicable to it, and this by itself is a sufficient answer to the suggestion. Besides, the law does not look with favor upon a defense based on the unlawful act of the party interposing it.

The case was carefully tried by the learned referee, who appears to have fairly considered and passed upon all the questions of law and fact raised before him. These questions are substantially raised by the assignments before us. As we are not able to discover in his findings of fact or conclusions of law any ground for reversing the decree recommended by him, we overrule the assignments.

Decree affirmed and appeal dismissed at the costs of the appellant.

EQUITY JURISDICTION.—The fact that there is a remedy at law will not prevent the claimant from resorting to equity, unless such remedy is plain and adequate: *Sandage v. Studebaker Bros. Mfg. Co.*, 142 Ind. 148; 51 Am. St. Rep. 165; *Pierstoff v. Jorges*, 86 Wis. 128; 39 Am. St. Rep. 881, and note; *McAfee v. Reynolds*, 130 Ind. 83; 30 Am. St. Rep. 194.

SPECIFIC PERFORMANCE OF CONTRACTS.—Specific performance is a matter of discretion in the court which withholds or grants relief, according to the circumstances of each particular case, when the general rules and principles which govern the court will not furnish an exact measure of justice between the parties: *Kofka v. Rosicky*, 41 Neb. 328; 43 Am. St. Rep. 685, and note. It is not granted as a matter of course: *Friend v. Lamb*, 152 Pa. St. 529; 34 Am. St. Rep. 672, and note; and will not be granted of a contract against public policy: *Chicago etc. Co. v. People's G. L. Co.*, 121 Ill. 530; 2 Am. St. Rep. 124, and note; nor of any contract not free from every imputation of fraud or deceit: *Kelly v. Central Pac. R. R. Co.*, 74 Cal. 557; 5 Am. St. Rep. 470; *Swint v. Carr*, 76 Ga. 322; 2 Am. St. Rep. 44, and notes.

CONTRACTS—DEFENSE OF ILLEGALITY.—Defendant may plead that a contract into which he voluntarily entered is contra bonos mores: *Gil v. Williams*, 12 La. Ann. 219; 68 Am. Dec. 767; *Hope v. Linden Park etc. Assn.*, 58 N. J. L. 627; 55 Am. St. Rep. 614. Courts of justice will not aid in the enforcement of illegal contracts: *Goodrich v. Tenney*, 144 Ill. 422; 36 Am. St. Rep. 459, and note.

**ROBB v. PENNSYLVANIA COMPANY FOR INSURANCE
ON LIVES AND GRANTING ANNUITIES.**

[186 PENNSYLVANIA STATE, 456.]

NEGLIGENCE—RUBBER STAMP CONTAINING A FACSIMILE OF A SIGNATURE.—The obtaining of a rubber stamp facsimile of one's signature is not unlawful nor necessarily negligent, and does not impose upon him the duty of informing a bank in which he had a deposit of the existence of such stamp, nor justify the bank in paying a check upon which such stamp had been impressed without authority by one who had obtained possession thereof without any negligence on the part of such depositor.

BANKING—CHECK FORGED BY THE AID OF A RUBBER STAMP.—A bank paying a check forged by the aid of a rubber stamp facsimile of the depositor's signature is liable to him for the amount so paid out, unless he was guilty of negligence whereby the forger obtained possession of the stamp.

Frank P. Prichard and John G. Johnson, for the appellant.

Samuel Gustine Thompson, for the appellee.

457 **McCOLLUM, J.** This suit was brought to recover the amount of a deposit made by the plaintiff with the defendant. It may be conceded for the purposes of this appeal that the deposit was paid out by the latter on checks purporting to be drawn by the former, and that the checks were forgeries. In the trial of the case in the court of common pleas and on the appeal to the superior court, the principal defense to the action was that, inasmuch as the plaintiff had, without notice to the defendant, procured a rubber stamp which would make a facsimile of his signature, he must sustain the loss occasioned by an unauthorized use of the stamp by a person who had unlawfully and clandestinely obtained possession of it, and, by means of it, perpetrated the forgeries on which the deposit in question was paid out by the defendant. The trial court, being of the opinion that it was not unlawful for the plaintiff to have such a stamp produced for his own proper use and convenience, refused to hold that his procurement of it without notice to the defendant constituted a bar to his suit for the money paid out on the forged checks. It held, however, that if the possession of the stamp by the forger of the checks was attributable in any degree to the negligence of the plaintiff in the care of it, such negligence would relieve the defendant from responsibility for the loss, but that the question whether he failed in the performance of his duty in this respect was for the jury and determinable on the testimony affecting it. This view of the case resulted in a verdict

for the plaintiff, and from the judgment entered thereon an appeal was taken to the superior court, which, in an opinion by its learned president, affirmed it. The case is now before us on the allowance of an appeal from the judgment of the superior court, and the defense made to the plaintiff's claim is simply a reiteration of ⁴⁵⁸ the defense made in the trial court, and on the appeal which resulted in the decision we are asked to reverse.

We cannot regard the production of the rubber stamp, on the plaintiff's request, as an unlawful act, nor can we assent to the claim that his procurement and possession of it without notice to the defendant relieved the latter from liability for the amount paid out on the forged checks. An act which is in and by itself entirely lawful, and which had no relation to the plaintiff's deposit with the defendant, did not impose upon the former the duty of notifying the latter of the performance of it, and if such a duty was not created by the plaintiff's procurement of the stamp, the loss occasioned by the use of it in the perpetration of the forgeries did not necessarily fall upon him. If, however, the forger obtained possession of the stamp through the negligence of the plaintiff, the responsibility for the loss occasioned by the forgeries would not rest upon the defendant if its cashier exercised due care in the inspection of the checks. It is needless to inquire on this appeal whether such care was exercised by the cashier, because the question is not raised by the assignments. The principal questions considered in the court of common pleas and in the superior court were whether the plaintiff's possession of the stamp without negligence in the care of it, and without notice to the defendant that he had it, relieved the latter from liability for the money paid out on the forged checks, and if it did not, whether the evidence in the case was sufficient to authorize a finding by the jury that the plaintiff, as owner and custodian of the stamp, had taken proper precautions to prevent an unlawful appropriation or use of it. It seems to us that these questions were rightly determined by the courts referred to, and that the reasons given for the conclusions arrived at by them were sound. The clear, concise, and convincing opinion of the learned president of the superior court fairly includes and disposes of the material questions in the case, and upon it we unhesitatingly rest an affirmance of the judgment.

The fourth assignment alleges error in the instructions to the jury on the question of negligence, but a careful consideration of the charge has satisfied us that there is no error in it.

Judgment affirmed.

^{458a} WILLIAMS, J., dissenting. I dissent earnestly from this judgment and from the reasons given in support of it in the opinion just filed. It puts an additional burden upon the defendant bank not resulting from the commercial contract between it and its depositor. When an account is opened at a bank by the deposit of money, the depositor leaves his genuine signature with the banker for his guidance and protection in the payment of checks. When checks are presented bearing this signature they must not be refused, but if the signature is a forgery, no matter how skillfully it is done or how difficult of detection, they must not be paid. The contract which the commercial law raises upon the deposit of money with a banker is that the deposit shall be paid out only to the depositor or his order. Payment upon a forged check is, therefore, no payment and in no way affects the depositor. But if the depositor executes a check, and for any reason leaves it on his table, where it is found by another, who fills it up, presents it at bank, and receives payment upon it, this is a good payment by the bank, and the loss is that of the depositor, for the check was signed by him. If, instead of leaving his check upon the table, the drawer had deposited it in a drawer within his safe, locked the safe, and put the key away in a box in his office, precisely as Mr. Robb did with his stamp, nevertheless if a clerk or employé had taken the key from the box, unlocked the safe, abstracted the check, and used it for his own benefit, its payment by the bank would have bound the depositor. His loss would have been due not to the failure of the banker to distinguish his genuine signature, but to the crime of his employé, who had obtained it surreptitiously. One of two innocent persons must suffer because of the payment of the check, and the law determines that the loss shall fall upon him whose act or omission made the loss possible. If the depositor had not signed his check and left it where it was possible for a criminal to appropriate it, palpably the loss could not have happened. This principle rules the case now before us. It is conceded that Mr. Robb caused the stamp to be made with which this check was executed. He says he only intended to use it for a particular purpose, but it is perfectly apparent that he intended his signature produced by this stamp should be recognized as his by the friends and acquaintances who should receive it, as it certainly would be. ^{458b} The signatures made by it as they are presented to us in the paper books, when placed by the side of admittedly genuine signatures are indistinguishable from them. Now this stamp belonged to him, was made under his direction,

and for his use. It was intended for the rapid production of his signature. It was in his possession. He was bound to take care of it as safely as of his own signature made by himself with his own hand. He was bound to do this at his peril. There is no question of reasonable or sufficient care in the case. As with the signed check, so with this stamp signature. When he put it in his safe and left the key where it was possible for anyone to get it and so gain admission to the safe, he exposed himself to the loss that might follow, and that loss is his. He seeks in this action to put his own proper loss upon the bank that paid the checks by alleging that the checks were forged. But they were not forged. The signature was his. He prepared it. All that can be said is that he did not affix it to the checks. But he had prepared it so that anyone could affix it to a check or any other paper, and, when so affixed, it was absolutely impossible to tell that it had not been done by him. There would be some justification for his claim upon the bank if he had advised the banker that he had prepared such a signature that might by a possibility be clandestinely gotten from his possession, and given him an impression made by it, and pointed out, if he could have done so, how it might be distinguished from his signature as made by a pen, but he did nothing of the kind. If the bank is not protected by his signature made by means of his own private stamp, if they are bound at their peril to know and discriminate between his signature made with his pen and that made with his private stamp, then he has, by the use of the stamp, very greatly increased the responsibility and peril of the banker without so much as giving him notice or affording the slightest intimation of the necessity for additional vigilance in scrutinizing checks purporting to bear his signature. Upon every rule of commercial law and upon every consideration of equity and good conscience, the judgment entered in the court below in this case should be reversed and judgment should be entered here in favor of the defendant.

BANKS AND BANKING—PAYMENT OF FORGED CHECKS—NEGLIGENCE OF DEPOSITOR.—A bank is bound to know the signature of its depositors, and the payment of a forged check, however skillfully executed, cannot be debited against the depositor, if he is wholly free from neglect or fault: *First Nat. Bank v. Allen*, 100 Ala. 476; 46 Am. St. Rep. 80; note to *First Nat. Bank v. Northwestern Bank*, 43 Am. St. Rep. 259; *Janin v. London etc. Bank*, 92 Cal. 14; 27 Am. St. Rep. 82, and note. In absence of suspicious circumstances, a bank need not pay any attention to the handwriting of other parts of a check than the signature: *Gunster v. Scranton Illuminating etc. Co.*, 181 Pa. St. 327; 59 Am. St. Rep. 650. A ques-

tion similar to that decided in the principal case received a similar determination in Massachusetts: See monographic note to *People's Bank v. Franklin Bank*, 17 Am. St. Rep. 897; but under a state of facts less strong in favor of the depositor. Where a loss which must be borne by one of two parties alike innocent of a forgery can be traced to the fraud or neglect of either, it is reasonable that it should be borne by him, even though innocent of any intentional fraud, through whose means it has succeeded: *First Nat. Bank v. First Nat. Bank*, 151 Mass. 280; 21 Am. St. Rep. 450; monographic note to *Laborde v. Consolidated Assn.*, 39 Am. Dec. 520.

LOUGHIN v. McCAULLEY.

[186 PENNSYLVANIA STATE, 517.]

DEATH OF HUMAN BEING—LIABILITY OF OWNERS OF VESSELS FOR.—The acts of Congress limiting the liability of the owners of vessels to their shares or interests therein apply to liabilities for causing the death of a human being through the negligent operation of such vessel.

CONSTITUTIONAL LAW.—MARITIME LAWS CANNOT BE CONTROLLED BY THE CONSTITUTION AND STATUTES OF A STATE in opposition to an enactment by Congress.

VESSELS.—THE STATE COURTS ARE CONTROLLED BY THE ACTS OF CONGRESS LIMITING THE LIABILITY OF OWNERS OF VESSELS.—If such were not the case, it would be the duty of the state court, upon bringing an action therein seeking to enforce an alleged cause of action against the owner of a vessel, to decline to exercise jurisdiction thereof, if, by so doing, it would impose or enforce a liability forbidden by an act of Congress.

VESSELS—PRACTICE IN THE STATE COURTS.—If the owners of a vessel are sued in a state court for a liability alleged to have resulted from their negligence in the operation of a vessel, they should be permitted to show the value of such vessel and their respective ownerships therein, and the jury should be instructed to find the value of the vessel and the proportion of the ownership of the defendants, to the end that none of them should be held answerable beyond the value of his interest.

Action against the defendants as the owners of a steam tug to recover for the death of the plaintiff's husband claimed to have been due to negligence in the operation of such tug. The defendants offered evidence of the value of the tug and their proportions of its ownership, but it was excluded under objection of the plaintiff, and a verdict and judgment for eight thousand five hundred dollars given for plaintiff, and the defendants appealed.

John F. Lewis, John G. Johnson, and H. L. Chayney, for the appellants.

Fred Taylor Pusey and Wendell P. Bowman, for the appellee.

⁵¹⁹ MITCHELL, J. The substantial question in this case is the right of the appellants to have their liability for damages to the plaintiff limited to the value of their respective interests in the vessel which is alleged to have caused the injury.

The act of Congress of March 3, 1851 (9 Stats. at Large, sec. 3, p. 635; Rev. Stats. 1878, sec. 4283), provides that "the liability of the owner or owners of any ship or vessel for any embezzlement, loss, or destruction by the master, officers, mariners, passengers, or any other person or persons, of any property, goods, or merchandise shipped or put on board of such ship or vessel, or for any loss, damage, or injury by collision, or for any act, ⁵²⁰ matter, or thing, loss, damage, or forfeiture done, occasioned, or incurred without the privity or knowledge of such owner or owners, shall in no case exceed the amount or value of the interest of such owner or owners respectively in such ship or vessel and her freight then pending." And the act of June 26, 1884 (23 Stats. at Large, sec. 18, p. 57; Supp. Rev. Stats., ed. 1891, p. 443), makes a substantially similar provision in more condensed phraseology: "That the individual liability of a ship-owner shall be limited to the proportion of any or all debts and liabilities that his individual share of the vessel bears to the whole, and the aggregate liabilities of all the owners of a vessel on account of the same shall not exceed the value of said vessels and freight pending." By the act of June 19, 1886 (24 Stats. at Large, sec. 4, p. 79; Supp. Rev. Stats., ed. 1891, p. 494), the act of 1884 is made to apply to "all vessels used on lakes or rivers or in inland navigation, including canal boats, barges, and lighters."

In *Butler v. Boston etc. S. S. Co.*, 130 U. S. 527, it was held that this limitation of liability applies to actions for damages for death caused by negligence. And on this point see, also, *Craig v. Continental Ins. Co.*, 141 U. S. 638. It was further held in the former case that the limitation of liability was enacted by Congress as part of the maritime law of the United States, and is coextensive in its operation with the whole territorial domain of that law. It applies, therefore, to the case of a disaster happening within the limits of a county of a state, and to a case where the liability itself arises from a law of the state.

These statutory limitations of liability, so construed by the supreme court of the United States, would seem to settle the question in this case in favor of appellants. But it is argued for appellee that they cannot prevail against the prohibition in

section 21, article 3, of the constitution of Pennsylvania against any limitation of the amount to be recovered for injuries resulting in death, and that in any view they cannot be administered by a Pennsylvania court in a common-law action.

As to the first objection, it is clear that neither statute nor constitution of Pennsylvania can be set up against a right given by Congress in its control of the maritime law of the country. That control is paramount, and when it has been exercised in a ⁵²¹ particular way, all state authority must conform to it. The second objection, that the limitation cannot be administered by a state court in a common-law action, must depend primarily on the language of the acts of Congress and the nature of the right which they confer. If such right is contingent on something to be done by the vessel owner or others, then we must look into the pleadings or the evidence of the acts of the parties. But if, on the other hand, the right is absolute, then clearly it cannot be defeated by the plaintiff's choice of the tribunal, and if the state court is unable, through defect of its jurisdiction over parties or subject matter, or through its methods of procedure, to protect the right, then the court must dismiss the case for want of appropriate powers to determine it in accordance with the paramount law on the subject.

This brings us to the consideration of the acts of Congress. The limitation of liability under both the acts of 1851 and 1884 is general and absolute. By the former the liability "shall in no case exceed," and by the latter, "shall be limited to" the value of the individual owners' interest in the vessel. The former provision is contained in section 3 of the act of 1851, and by section 4 it is provided that whenever the loss is by several owners of goods, et cetera, and the whole value of the vessel and freight is not sufficient, they shall receive compensation in proportion to their respective losses, and the owner of the vessel may take appropriate proceedings in any court for the purpose of apportioning the sum for which he is liable among the parties entitled thereto. It then continues that it shall be sufficient compliance by the owner with the requirements of the act if he shall transfer his interest in the vessel and freight to a trustee for the parties entitled, to be appointed by any court of competent jurisdiction, and thereupon all claims and proceedings against the owner shall cease. There is nothing in this section which in any way changes the positive character of the limitation. The provisions are manifestly in furtherance, not in restriction, of the vessel owner's right, and are directory only in

the sense that they point out a method by which his right may be enforced, but are not exclusive of other methods which may be found effective for the same purpose.

And such we understand to be the construction settled by the supreme court of the United States. In the case of *The Scotland*, ⁵²² 105 U. S. 24, it was said by Bradley, J.: "The primary enactment in section 4283 of the Revised Statutes is that the liability of the owner for any loss or damage shall in no case exceed the amount of value of his interest in the vessel and her freight then pending. Two modes for carrying out this law are then prescribed, one in section 4284 and the other in section 4285." These sections are the revision and re-enactment of section 4 of the act of 1851 just discussed. The same opinion then proceeds to show that these modes are in aid and not in restriction of the owner's right to limit his liability, and are not, therefore, exclusive, but the defense may be made in any form that the nature of the case and the procedure of the court will permit. And to the same effect are *Providence etc. Co. v. Hill Mfg. Co.*, 109 U. S. 578, 594, and *Craig v. Continental Ins. Co.*, 141 U. S. 638. The very point of the admissibility of this defense in an action in a state court was decided in the case of *The Rosa*, 53 Fed. Rep. 132, where a petition by the vessel owner for establishment of limited liability and for prohibition of further proceedings by a plaintiff in a state court was dismissed by the district court of the United States on the ground that the defense could be adequately made in the state court. It is true that this conclusion has been dissented from in *Quinlan v. Pew*, 56 Fed. Rep. 111, 121, but apparently on the ground that the vessel owner's privilege, not only to have the value of the vessel appraised and his liability limited to that, but also to have all parties compelled to come into the admiralty court with their claims, was absolute under the statute and could not be refused in view of the want of power of the state court to enforce the latter branch of the remedy. But even this case does not sustain the contention that the vessel owner may not make his defense in the state court if he so chooses.

We are of opinion that appellants' right to make this defense is clear, and we see no difficulty in enforcing it in this action. They should have been permitted to show the value of the tug, and their respective proportions of ownership in it. The most convenient practice then would be, after appropriate instructions to the jury, to direct them if they found for the plaintiff to find specially in addition the value of the tug, and the proportionate

ownership of the several defendants. With these facts specifically found, the verdict could be molded by ⁵²³ the court into proper form with less danger of mistake than if the whole were left in a lump to the jury.

The questions of defendant's negligence and Loughin's own contributory negligence could not under the evidence, have been taken from the jury.

A number of questions are raised by the assignments of error in regard to irregularities in the swearing of the jury and in the verdict and judgment, but, as all of these will be easily avoided at the next trial, it is not necessary to discuss them.

Judgment reversed and venire de novo awarded.

ADMIRALTY—FEDERAL AND STATE LEGISLATION—JURISDICTION OF STATE COURTS.—Wherever it is within the power of Congress to legislate, it is competent for it to exclude the jurisdiction of the state courts in respect to all subjects over which legislative action is authorized: *People v. Welch*, 141 N. Y. 286; 38 Am. St. Rep. 793. See *Scatcherd Lumber Co. v. Rike*, 113 Ala. 555; 59 Am. St. Rep. 147. State statutes cannot override acts of Congress: *Walters v. Steamboat Mollie Dozier*, 24 Iowa, 192; 95 Am. Dec. 722; but there is concurrent jurisdiction of state and federal courts as to common-law remedies: *Case v. Woolley*, 6 Dana, 17; 32 Am. Dec. 54; *Thompson v. Steamboat Morton*, 2 Ohio St. 28; 59 Am. Dec. 658. An action to recover for the negligent killing of plaintiff administrator's intestate, brought against the owners of a vessel, was held to be within the jurisdiction of a state court, in *Chase v. American Steamboat Co.*, 9 R. I. 419; 11 Am. Rep. 274.

TRADESMEN'S NATIONAL BANK v. KENT MANUFACTURING COMPANY.

[186 PENNSYLVANIA STATE, 556.]

A WAREHOUSEMAN is one who carries on the business of receiving and keeping goods in storage for compensation. Hence one cannot be a warehouseman of his own goods.

WAREHOUSEMAN—WHO IS NOT.—Though one professes to be a warehouseman and issues warehouse receipts, yet, if he is in fact the clerk of another, by whom the rent of the warehouse is paid, and the warehouse receipts are issued to his employers, who pay no storage, and are the only persons having property in such warehouse, he is not a warehouseman, and receipts issued by him on the property of his employers have not the legal attributes of warehouse receipts.

WAREHOUSE RECEIPTS—WANT OF NOTICE OF CHARACTER OF.—If a person professing to issue warehouse receipts is not a warehouseman in fact, but merely assumes to be such warehouseman for the purpose of issuing warehouse receipts for his employers on their own property in his charge, want of notice of these facts will not protect a person dealing in such receipts by taking an assignment not accompanied by an actual delivery of the property.

Action to recover one hundred and eighty-three bales of wool. This wool had been the property of the Keen-Sutterle Company, which had caused what purported to be warehouse receipts to be issued therefore, and had assigned them to the plaintiff. It afterward delivered the property to the defendants to secure advances. Under instructions of the trial court, the jury returned a verdict in favor of the plaintiff, and the defendants appealed.

M. Dubois Miller, Henry La Barre Jayne, E. H. Hall, and Biddle & Ward, for the appellants.

V. Gilpin Robinson and Samuel B. Huey, for the appellee.

562 MITCHELL, J. This belongs to the class of cases unfortunately too common, where one of two entirely innocent parties must suffer from the fraud of a third. The decision must, therefore, follow the better title by strict law. The wool in controversy was the property of the Keen-Sutterle Company, who were the perpetrators of the fraud. The appellants have the actual possession, having received the wool in the regular course of business from the Keen-Sutterle Company and made advances upon it to nearly its full value. Their lien for repayment is now put in peril by an alleged prior transfer of title to the plaintiff by means of a warehouse receipt. The substantial question is, whether the receipt was in fact issued by a bona fide warehouseman.

563 The act of September 24, 1866 (Pub. Laws, 1867, 1363), makes a warehouse receipt negotiable to the extent that the person taking a transfer of it by indorsement and delivery is to be deemed the owner of the goods therein specified. By the general law governing such instruments, this means that the transfer of the receipt is a constructive delivery of the goods. If, therefore, the receipt under which the plaintiff claims was a valid warehouse receipt within the statute, the plaintiff's title must prevail, notwithstanding the good faith and priority of the appellants' actual possession.

But in order to have this effect, the requisites of the statute must be complied with, and plainly the first of these is that there must be a receipt issued from a bona fide warehouse. The act does not prescribe any form of receipt, and it is conceded that the one in controversy is sufficient in that respect. It purports to be issued by a warehouseman, and to be for goods held on storage and deliverable on the order of the depositor and the return of the receipt.

Nor does the act define a warehouse or a warehouseman, but uses the latter word in connection with "wharfinger or other person" (*eiusdem generis*, *Bucher v. Commonwealth*, 103 Pa. St. 528), in its ordinary signification of one who carries on the business of receiving and keeping goods on storage for the owners, for compensation. The act prohibits the issue of a receipt unless the goods shall have been actually received into store or upon the premises of the warehouseman; the issue of any second or duplicate receipt while the first is outstanding, without writing the word duplicate across the face of the second; the delivery of any goods receipted for except on surrender of the receipt; and the sale, encumbrance, et cetera, by the warehouseman of goods receipted for. These provisions plainly contemplate that the warehouseman shall be one engaged in the business, and also that he shall be another than the owner of the goods. A large part of the security of the holder of the receipt for the actual production of the goods when called for is the business interest and good faith of the warehouseman, and the penal consequences of any breach of duty by him. This security would be greatly diminished, if not rendered worthless, if any owner could choose to say his goods were on storage with himself and issue receipts which should pass from hand to hand for value, ⁵⁶⁴ while the goods remained under his own control, or subject to levy by his creditors. On this subject, see the remarks of Winslow, J., in *Geilfuss v. Corrigan*, 95 Wis. 651, 60 Am. St. Rep. 143, and of Guffey, J., in *Mechanics' Trust Co. v. Dandridge* (Ct. of App. of Ky., Oct. 24, 1896), 37 S. W. Rep. 288.

In the present case, one Turtle issued the receipt in question in sufficient form, as already said, purporting to be from "Turtle's Warehouses, 220, 222, and 224 Wood St.," and plaintiff at the trial showed the issue of a number of similar receipts by Turtle over a period of about two years; the negotiation of loans by several New York banks to the Keen-Sutterle Company on these receipts; and the lease by Turtle of the premises on Wood street in his own name as a warehouse. Many exceptions are raised by appellants to the method of proof of these facts, and to their relevancy. But it is not necessary to discuss them, though some of them are clearly well founded. For present purposes it may be conceded that, standing alone, the facts so proved would make out a *prima facie* case of warehouse receipt, though the case would be weak in the respect that nearly all the evidence was of the kind that may be called corroborative rather than positive in character.

But the above-stated facts shown by plaintiff did not stand alone. On the contrary, they were accompanied by an array of others, undisputed, or so feebly contested as to be practically admitted, that deprived them of all real weight. It appeared that Turtle, during all the time he was nominally keeping the warehouse and issuing receipts for goods on storage there, was a clerk in the employ of the Keen-Sutterle Company, at a salary; that the rent of the so-called warehouse was not paid by Turtle, but by the Keen-Sutterle Company, or by F. W. Sutterle, one of the partners, and the rent due to Turtle from the subtenants of a part of the warehouse was not paid to him, but to the Keen-Sutterle Company or F. W. Sutterle, and the only explanation given was that there was some private arrangement, not disclosed, between Turtle and Sutterle, on this subject; that no storage charges were paid by the Keen-Sutterle Company to Turtle on account of this warehouse, nor any credit given him on their books; that no persons other than the Keen-Sutterle Company deposited any goods in the so-called warehouse, though a few receipts were issued in the name of J. B. Moors ⁵⁶⁵ & Co., under some arrangement with the Keen-Sutterle Company, which the learned judge declined to permit to be inquired into; and that Turtle had no sign on the warehouse to indicate his proprietorship, kept no books of the business except a book of blank receipts, had no office or even a desk in the warehouse, did not keep the key in his possession, was rarely there, and left the whole charge, including the depositing and removal of goods, to the employes of the Keen-Sutterle Company. On these facts it is perfectly clear that there was no real warehouse at all in the case, and that Turtle was a mere employé or man of straw used by the Keen-Sutterle Company to cover their own operations with their own goods.

The counsel for appellee have argued very strenuously the proposition that if Turtle held himself out to the world as a warehouseman, and plaintiff had no knowledge to the contrary, it would be sufficient to put plaintiff under the protection of the statute. And the learned court below seems to have fallen into the same view. But this is not enough. To defeat the title of defendants as a consignee without notice, for value, and in good faith, Turtle must have been a warehouseman in fact, and plaintiff's title derived through an actual valid warehouse receipt. It is not a question of good faith, or even of diligence, on plaintiff's part, but of the possession of a good title by means of a valid and genuine receipt. This the plaintiff had failed to prove.

The paper given to it was not such a receipt, but a fraudulent imitation, and the bank must, unfortunately for it, bear the loss. On the practically undisputed facts the verdict should have been directed for defendants.

Judgment reversed.

WAREHOUSEMAN—WHO IS—WHO IS NOT.—A warehouseman is a person who receives goods and merchandise to be stored in a warehouse for hire. Therefore, a corporation which never operated a warehouse, nor issued warehouse receipts, except upon its own property for the purpose of securing loans thereon, does not carry on the business of a warehouseman, either public or private: *Franklin Nat. Bank v. Whitehead*, 149 Ind. 560; 63 Am. St. Rep. 302, and note; *Geilfuss v. Corrigan*, 95 Wis. 651; 60 Am. St. Rep. 143, and note.

WAREHOUSEMAN—ASSIGNEES OF INVALID RECEIPTS.—One who is not a warehouseman, but who issues what purports to be a warehouse receipt on his own property for the purpose of securing a creditor, is not estopped from proving that he was never a warehouseman, where the creditor had knowledge of the true state of facts, and was not deceived by any action of the debtor: *Franklin Nat. Bank v. Whitehead*, 149 Ind. 560; 63 Am. St. Rep. 302. See monographic note to *Rice v. Outler*, 84 Am. Dec. 752-754.

MORRIS v. CAMPBELL.

[186 PENNSYLVANIA STATE. 589.]

EXECUTION SALE—WHEN RELATES TO THE DATE OF A MORTGAGE.—If a judgment is recovered upon a bond secured by a mortgage, and a fieri facias is issued and a sale made thereunder of the mortgaged premises, the title relates to the date of the mortgage, and hence divests the title of grantees of the mortgagor subsequent to its execution, though such grantees were not parties to the action.

William W. Ker and S. Holmes, for the appellants.

C. W. Bull, for the appellee.

⁵⁹¹ **GREEN, J.** The defendants took their title by a deed dated October 31, 1892, and in that deed it was expressly stated that the title ⁵⁹² was subject to a mortgage to secure the payment of three thousand six hundred dollars in favor of William R. Rinehart, given by William F. Brantley, dated January 6, 1891. As this mortgage was given less than two years before the conveyance to the defendants, it was a very recent transaction, all the particulars of which must necessarily have been known and considered by the defendants at the time they received their deed. They were, of course, legally bound to know everything that was contained in the mortgage as it appeared

at the time it was placed upon record, which was January 9, 1891. On the face of the mortgage as recorded was a full recital of the bond which the mortgage was given to secure, and, as there recited, the bond was a bond given by William F. Brantley to William R. Rinehart in the penal sum of seven thousand two hundred dollars conditioned for the payment of three thousand six hundred dollars five years after the date thereof, with interest thereon payable annually, with a condition that if default was made in the payment of interest for sixty days after any payment of interest should fall due, the principal sum should thereupon become due and payable. When they bought the property, the defendants knew that they were to pay the interest as it became due on this mortgage and the time at which it fell due, and they also knew that if they failed to pay it for sixty days after it fell due they would be in default, and the whole principal sum would thereupon become due and payable. It was clearly their duty, therefore, to pay the interest on this bond within sixty days after it matured, or to take the consequences of a failure to pay. While it is not a matter of any consequence, so far as their legal duties and responsibilities are concerned, whether they were specially called upon for the payment of the interest due on January 6, 1894, it is alleged in the counter-statement, and not denied by the defendants, that they were notified by mail on March 1, 1894, that payment of the overdue interest was required to be made, and that they replied by letter promising to pay it not later than the 15th of the same month. As they did not keep the promise, judgment was entered on the bond, execution issued, and the property was sold, but not until May 25, 1894, almost five months after the interest payment fell due. It is also alleged in the counter-statement, and not denied, that the defendants knew of the sale before it took place and wrote a letter to Mr. Rinehart's attorney on April 30, 1894, inquiring for particulars ⁵⁹³ as to the sale, and the information was promptly given. It is also alleged in the counter-statement, and not denied, that James A. Campbell, one of the defendants, was represented at the sale by an attorney from Philadelphia, and at his request the sale was adjourned for an hour to enable him to communicate by telegraph with his client, and that the attorney bid at the sale of the property, but the property, after several bids were made, was struck off to Rinehart, he being the highest bidder.

The question whether the bond upon which the judgment was entered was the same bond which the mortgage was given

to secure was carefully and correctly submitted to the jury, who found that it was, and it is plain upon the least examination of the testimony of identification that they could not possibly have found any other verdict on that question. The only remaining question in the cause is, whether the lien of the judgment related back to the date of the lien of the mortgage, so that a sheriff's sale under the judgment divested the lien of the mortgage. Upon this question there can be no doubt, under all our decisions. As long ago as *McCall v. Lenox*, 9 Serg. & R. 302, it was held that if a bond and warrant of attorney are given accompanying a mortgage, a sale of the land under a *feri facias* and *venditioni exponas* issued on the judgment entered up under the warrant avoids a lease made by the mortgagor, after the mortgage, but before the entry of the judgment on the warrant. The ruling in this case has been followed ever since. In *Hartz v. Woods*, 8 Pa. St. 471, it was decided that a sheriff's sale under a judgment confessed for the interest accruing on a bond secured by mortgage, discharges the lien of the mortgage, although the defendant had previously to the judgment aliened the land, for it relates back to the lien of the mortgage; and this, though the mortgage is conditioned for the payment of the amount mentioned in the bond, and there is no express stipulation with respect to the interest in the mortgage. Coulter, J., delivering the opinion, said: "If the debt on which the land was sold was also a debt secured by the mortgage, then it was a matter of no consequence when Hassinger sold to Singer, because the lien of the judgment would run back to the lien of the mortgage, and, of course, carry the land with the sale, free from the lien of the mortgage." In this case a small judgment for some ⁵⁰⁴ interest only had been confessed many years previously, before a justice, a transcript was taken to the common pleas and a sheriff's sale made of the land to one from whom the defendant (*terre-tenant*) had title. A *scire facias* on the mortgage was, long after the prior sale under the judgment, brought against one who had title under the purchaser at the sale under the judgment, and he made defense that he had a good title divested of the mortgage, and it was in reference to that defense that the above-quoted comment was made.

A single further reference will be sufficient: *West Branch Bank v. Chester*, 11 Pa. St. 282; 51 Am. Dec. 547. A sheriff's sale of mortgaged premises upon a judgment obtained for the interest due upon the mortgage debt, which debt was payable in *futuro*, effects a virtual foreclosure of the mortgage, extinguishes

the equity of redemption in the mortgagor, transfers the legal estate still in him, and divests the lien of the mortgage. The money raised by a sale on such judgment is brought into court attended by the lien of the mortgage, and the mortgagee will be entitled to it in preference to creditors whose liens intervene between the mortgage and the judgment for interest thereon. The interest is part of the substance of the mortgage debt, it belongs not to it by tacking, it is not an incident of the debt, but pro tanto it is the debt itself. A very elaborate opinion was prepared and filed in the court below, in which the whole subject was discussed in the most exhaustive manner. The question was new and of very grave importance in view of the peculiar circumstances in which it arose, and the opinion of the lower court, holding that the whole title passed under the sale on the judgment, was fully approved and adopted.

The foregoing decisions have been selected out of many because they are much stronger illustrations of the doctrine in question than are required by the facts of the present case. In those cases the judgments were recovered for arrears of interest only, while here the judgment was for the full amount of the debt, principal and interest, and, therefore, the very identical debt in its entirety which was secured by the mortgage was included in the judgment. Further argument is unnecessary. Although there are numerous assignments of error, they are all controlled by the question already considered. The assignments of error are all dismissed.

Judgment affirmed.

MORTGAGE—FORECLOSURE—PURCHASER'S TITLE RELATES TO DATE OF MORTGAGE.—A purchaser at a foreclosure sale is only concerned with the state of the title at the date of the mortgage, and the existence of liens affecting the rights of the mortgagee. The mortgage ripens into a perfect title through the process of foreclosure: *Hokanson v. Gunderson*, 54 Minn. 499; 40 Am. St. Rep. 354, and note. Upon a foreclosure sale, the purchaser takes the title of the mortgagor as of the time when the mortgage lien was created: *Batterman v. Albright*, 122 N. Y. 494; 19 Am. St. Rep. 510, and note.

STAHR v. BREWER.

[186 PENNSYLVANIA STATE, 628.]

A JUDGMENT CONFESSED BY A MARRIED WOMAN is presumptively valid.

A MARRIED WOMAN SEEKING TO AVOID A JUDGMENT by confession must show not only the fact of her marriage, but also all other circumstances necessary to relieve her from liability.

A JUDGMENT AGAINST A MARRIED WOMAN cannot be stricken off for defects not appearing on the record.

JUDGMENT—MARRIED WOMAN'S LIABILITY UPON.—Where a married woman seeks to be relieved from a judgment against her upon a judgment note signed by her, upon the ground that she was not liable thereon, and there is evidence tending to prove that her husband conducted business in her name without any knowledge on her part of the details, and that she gave her name willingly to all his transactions whenever requested by him, and that the note in question was made to secure a debt due to the plaintiff, the question of her liability should be submitted to the jury, and the court is not justified in determining that she is not answerable.

George Rodney Booth, for the appellant.

Harry C. Cope, for appellee.

GREEN, J. The judgment note on which judgment was entered in this case was signed by the defendant alone, and the instrument was one which she could lawfully make, and upon which she could subject herself to liability. There was no irregularity or want of formality about it. The fact that she was a married woman does not appear on the record, and, even if it did, the marriage is no longer, in itself alone, a disqualifying circumstance. We have decided that a judgment confessed by a married woman is now presumably valid: *Abell v. Chaffee*, 154 Pa. St. 254; *Nuding v. Urich*, 169 Pa. St. 293; *Bank v. Bradshaw*, 178 Pa. St. 180. That being so, it devolves upon such a person, claiming the protection of her condition of marriage, to show affirmatively, not only the fact of marriage, but the presence also of those circumstances which relieve her from liability. This is what was sought to be done in the present case. The defendant applied by petition to the court below, setting forth that she was a married woman at the time of the signing of the judgment note upon which the judgment was entered, and that she did so at the solicitation of her husband, to secure the payment of a debt which he owed to the plaintiff. The petition ^{also} averred that the defendant received no consideration for the judgment. The plaintiff filed an answer to the petition in which he alleged that the defendant received full consideration for the judgment note for the reason that it was given in payment for materials furnished by him for the erection of buildings upon her separate real estate, and the answer denied that the judgment note had been given to secure the payment of a debt due by the husband of the defendant. The answer further averred that the defendant's husband had been insolvent for a number of years, and owned no prop-

erty real or personal, but that he had during all that time carried on the business of building and contracting, with defendant's capital, and on her credit, she being the owner of valuable real estate upon which several buildings were being erected during the time the said debt was contracted, and that the judgment note in question was given for the balance due on the account at the time a final settlement was made thereof. The learned court below at first discharged the rule to open the judgment, on the ground that as a receipt had been given for the judgment in payment for the debt, and it was competent for a wife to give a mortgage or a judgment in payment of her husband's debt, the giving of the judgment note was a competent act on the part of the wife, and she was liable on the judgment. Thereupon the wife filed a second petition asking for a rehearing, on the ground that she was not a party to the receipt and had no knowledge of it until after her husband's death. To this petition the plaintiff filed an answer alleging that the judgment note was given in payment, and not as security for the husband's debt; that the defendant had knowledge of the debt of her husband to the plaintiff; that the receipted bill was before the parties when the judgment note was given, and that the note was given with knowledge on her part that her husband owed the plaintiff the debt for the payment of which it was given. A large amount of testimony was taken by depositions, which tended to show that the defendant's husband was carrying on business on his own account, and simply using his wife's name to protect the property from the payment of his own debts. The court below, thinking that the testimony showed that the wife had no knowledge of the receipt, and not being a party to it, was not bound by it, and that there was not sufficient ⁶²⁷ testimony to show that her husband was acting as her agent in his various transactions, made the rule absolute to open the judgment, and intimated that had there been an application to vacate the judgment, that course would have been adopted. In consequence of this intimation, the defendant filed a third petition asking that the judgment be vacated and stricken from the record, on the ground that there were no disputed questions to try. To this an answer was filed claiming a jury trial on the disputed facts in the case, but the court made the rule to vacate the judgment and strike it from the record, absolute.

We think the judgment could not be stricken from the record, as we have decided that this can only be done for defects

appearing on the record: *France v. Ruddiman*, 126 Pa. St. 257.

An examination of the testimony does not convince us that there are no disputed questions of fact sufficient to carry the case to a jury. The defendant admits, with striking candor, that she had no knowledge of her husband's transactions in detail, but that he used her name in buying, selling, and encumbering the properties he bought; that she never received or furnished any money whatever in any of his operations, but that she did have full knowledge that he was using her name in all of them. In the course of these dealings a number of pieces of real estate were purchased, the deeds being made to her, but without any knowledge on her part as to what was the consideration, and without her paying a single cent of the purchase money, a considerable number of buildings were erected, sales were made, mortgages were given for money borrowed without her receiving any part of the money, and the entire business was conducted by her husband without any knowledge on her part of any of its details. Whenever her name was wanted to be used in any of the transactions she gave it willingly upon his mere request. She admits that she had full knowledge of this mode of conducting the business, and she constantly described it in her testimony as his business, and not hers. She expressly testifies that her husband built the six houses that were put up on land held in her name; that he bought all the materials, and employed all the workmen; that he bought no land except what was taken in her name; that she furnished no money for the erection of the buildings; that she was living ~~was~~ in one of the houses that was built in this way upon land held in her name, and that her husband told her that the judgment now in question was given to the plaintiff to secure him for a debt he owed him.

We do not think that it can fairly be said of such testimony as this that it raises no questions of fact to be submitted to a jury respecting the debt in question. Without discussing it now, for obvious reasons, it seems to us that it does raise, not merely the question of agency for the wife, if the transactions are to be regarded as legally hers, but also the question whether she received full consideration for the judgment, and the still more important question, whether the whole business was not a mere contrivance to use his wife's name, not because the properties were really hers, but in order to shield them from the claims of his own creditors. As it was all done with her full knowledge and consent, she could not escape liability for the

mere reason that her name was used, when she admits over and over again that she never furnished any money whatever, either in paying for any of the land bought, or for any of the materials purchased, or labor employed in erecting the various buildings that were placed upon the land held in her name. Without considering any further the numerous matters of detail which readily appear on the surface of such transactions, we are of opinion that they should be heard and decided by a jury, and we therefore conclude that the order vacating and striking off the judgment must be reversed and that the rule to open the judgment and let the defendant into a defense should be sustained.

The order to vacate and strike off the judgment is reversed and the rule to open the judgment is made absolute, and the record is remitted for further proceedings.

JUDGMENTS BY CONFESSION—MARRIED WOMEN.—The preponderance of authority does not go to the extreme of holding a judgment confessed by a married woman void. It is voidable merely, and if she allows it to stand and her property is sold, the purchaser will acquire title against a creditor who has no lien on the property. It is presumed to be binding: See monographic note to *Caldwell v. Walters*, 55 Am. Dec. 607, discussing the matter at length.

JUDGMENT AGAINST MARRIED WOMAN—VALIDITY.—Judgment against a married woman is not void, and therefore, to a scire facias based upon an unconditional judgment, it is not sufficient to plead that the defendant, at the time of its recovery, and of the execution of the obligation on which it was founded, was a married woman: *Shupp v. Hoffman*, 72 Md. 359; 20 Am. St. Rep. 476. See *White v. Foote Lumber etc. Co.* 29 W. Va. 385; 6 Am. St. Rep. 650, and note. Judgments against married women are discussed in the monographic note to *Caldwell v. Walters*, 55 Am. Dec. 599-611. Compare *Spencer v. Parsons*, 89 Ky. 577; 25 Am. St. Rep. 555.

MARCH v. METROPOLITAN LIFE INSURANCE COMPANY.

[186 PENNSYLVANIA STATE, 629.]

INSURANCE.—A MISREPRESENTATION or untrue statement in an application for life insurance, if made in good faith, does not, under the statutes of Pennsylvania, avoid the policy, unless it relates to some matter material to the risk.

INSURANCE—MATERIALITY OF REPRESENTATION—WHEN A QUESTION OF LAW.—When a statement or representation contained in an application for life insurance relates to the applicant being insured in any other company or to his having made an application for insurance and been rejected, or as to particulars of his having had ailments, such statement or representation must be adjudged material to the risk as a matter of law, and its materiality should not be submitted to the jury for decision.

INSURANCE—LIFE—ANSWERS IN APPLICATION—WHEN DEEMED FALSE.—If, in answer to the question whether he has ever spit blood, the applicant answers, "No," his answer must be deemed false if he has had an expectoration amounting to a hemorrhage.

LIFE INSURANCE—APPLICATION IS PRESUMPTIVELY CORRECT.—Where certain questions and answers thereto appear in an application for a life insurance, and such answers are shown to be false, it is error for the court to instruct the jury that such answers are a fraud upon the company, "if those questions were asked."

LIFE INSURANCE.—IF AN APPLICANT WAS AFFLICTED WITH AN OCCULT AILMENT, unknown to her, her failure to communicate it cannot be regarded as a fraud upon the insurance company.

INSURANCE—LIFE.—Where an applicant for insurance is asked whether he is afflicted with consumption and answers, "No," his answer must be regarded as material and false if he is affected with that disease, if the circumstances show that the insured could not have been ignorant of the presence of the disease.

INSURANCE—LIFE—FALSE ANSWER MADE BY BENEFICIARY.—If an application for insurance upon the life of a wife is signed by her husband and contains an absolutely false answer, the insurance being payable to him, he cannot recover on the ground that the wife did not sign the application and therefore was not guilty of misrepresentation.

INSURANCE—LIFE—MISREPRESENTATIONS.—If, in an application for life insurance, false answers are given respecting matters material to the risk, the trial judge should direct a verdict in favor of the defendant.

Assumpsit to recover on a policy of life insurance. The court instructed the jury that the policy could not be avoided on account of any answer to questions made by the applicant, if such answers were made in good faith and were not upon some subject material to the risk, but if they were material, that they might have the affect of avoiding the policy. As to the question whether the applicant was insured in any other company, the court submitted to the jury to determine from all the circumstances in evidence whether the question was material to the risk. The court also left it to the jury to say whether the negative answer given by the applicant to the question whether she had consumption was true or false. Respecting the answer to the question as to whether the applicant had ever spit blood, to which she had answered, "No," the court said that the fact that she had had hemorrhages in her younger days, did not show that the answer was false, and that the insurer, if he wanted to know whether the applicant had had hemorrhages, ought to have asked her that question, and not whether she spit blood, and that it was for the jury to consider all these things and say whether there was a false representation or not. In response

to the question asked her for particulars of any illness the applicant had had since her childhood, and to give the name of the physician attending, she had answered that she had but slight ailments, not needing a physician. It was proved, however, that she had serious ailments, had been in the hospital, and was threatened with consumption, and had been in a delicate condition for a good while. The court said that if the jury found that this was a material risk, it seemed to him that the answer was false. The court refused to charge the jury that their verdict should be in favor of the defendant. A verdict was given for the plaintiff, and the defendant appealed.

W. Roger Fronefield, for the appellant.

William I. Schaffer, for the appellee.

⁴⁶¹ **GREEN, J.** The several assignments of error in this case raise practically the same question. That question arises upon the reading of the act of June 23, 1885. (Pub. Laws, 134.) The first section provides: "Whenever the application for a policy of life insurance contains a clause of warranty of the truth of the answers therein contained, no misrepresentation or untrue statement in such application made in good faith by the applicant shall effect a forfeiture or be a ground of defense in any suit brought upon any policy of insurance issued upon the faith of such application, unless such misrepresentation or untrue statement relate to some matter material to the risk." The meaning of this language is perfectly plain. A misrepresentation or untrue statement in an application, if made in good faith, shall not avoid the policy unless it relate to some matter material to the risk. If it does relate to such matter, the act is inapplicable. If the matter is not material to the risk, and the statement is made in good faith, although it is untrue it shall not avoid the policy. As we said in *Herman v. Fidelity Mut. Life Assn.*, 151 Pa. St. 17, this act has effected a change in life insurance contracts, and a very wise and wholesome change it is. It provides against the effect which formerly attached to warranties as to many frivolous and unimportant matters contained in the questions and answers set forth in the applications, which often were of no consequence as to the risk involved, but which the courts were obliged to uphold simply because they were warranties. This class of merely technical objections to recovery is now swept away. Ordinarily questions of good faith and materiality are for the jury, and where the materiality of a statement to the risk involved is itself of a doubtful character,

its determination should be submitted to the jury. But it was never intended by the act of 1885, nor did that act assume, to change the law in cases where the matter stated was palpably and manifestly material to the risk, or where it was absolutely and visibly false in fact. Neither the *Hermany* case, nor any other case before or since, has made any change in the law in this class of cases. On the trial of the case now before us, the learned trial judge, who seemed to be at some loss in his views of the act of 1885, gave instructions to the jury which appear to be somewhat inconsistent. After stating the distinction between representations and warranties, and adding that if any false representations or warranties were made, they were material to the risk, he said: "That is the question as I understand it, although I announce this with some doubt, because my first impression was that the materiality where the facts are undisputed would be for the court, but as I understand the decision of the supreme court, as read by the counsel in the case, the question of materiality is for the jury." He then presented various subjects to the jury arising upon the questions and answers contained in the application. As to some of them, he left the question of materiality to the jury, while as to others he ruled that they were material, and that false answers to them would vitiate the policy. The first one of these questions which were submitted to the jury as to their materiality, was the following: "Are you insured in any other company?" The court charged that whether this was material must be decided by the jury, and argued to the jury that it might be material in one sense, but in another sense it might be immaterial. Another question was as stated by the court: "Have you made application and been rejected or has any insurance company, et cetera, declined orally or in writing to insure you, and to that question she has answered, 'No.' . . . I take it it is for the jury to say whether it was material." Another question was, "Give full particulars of any illness you may have had since childhood." The answer was, "Have had but slight ailments not needing a physician." The court said: "That was her answer. Now it appears as a matter of fact that she had serious ailments, that she had been in a hospital, that she was threatened with consumption, and that she had been, according to most of the testimony, in a delicate condition for a good while . . . Now here ⁶⁴² is the answer in writing, she has signed it and she has made that warranty, and if it is material, it appears not to have been truly answered, and if it is material to this risk, it is a forfeiture

rendering the policy void, and there can be no recovery. If you find that was a material representation and that it was false, I charge you there can be no recovery." As to the questions which were asked and answered in relation to spitting blood, unsound in health at the delivery of the policy, consumption, serious ailment at the delivery of the policy, the court held they were material, and if falsely answered the policy was avoided.

In respect to the first class of questions above enumerated in which the materiality of them was submitted to the jury we are clearly of opinion that they were all material and that the jury should have been so instructed. The act of 1885 has nothing to do with this question. If these were material questions before that act was passed they are material still, and must be pronounced by the court without reference to the jury.

A strong case illustrating the materiality of this class of questions is *United Brethren Mut. Aid Soc. v. O'Hara*, 120 Pa. St. 256. In the opinion delivered by Paxson, J., it is said: "The eighth interrogatory in the application is: 'Have you had any medical attendance within the last year prior to this date? If so, for what disease? Give name and address of the doctor in full.' The object of this inquiry is manifest. If the assured had no medical attendance within the time prescribed, and so answers, that is the end of it. But if he had such attendance, then the company is entitled to know for what cause he had medical advice or aid, and the name and address of the doctor, in order that they may ascertain the particulars from him. And if the assured falsely answer that he had no medical attendance he is not entitled to recover." This case was decided in 1888, three years after the passage of the act of 1885. In *Mengel v. Insurance Co.*, 176 Pa. St. 280, decided in 1896, one of the questions was, "Have you always been temperate?" and the answer was, "Yes." We held there could be no recovery because the incontrovertible proof was that the insured had been very frequently drunk, and at least six times during the preceding five years had required the services of a physician from that cause. ⁶⁴⁴ He died in four months after the policy was issued, of delirium tremens, resulting from intemperance. Another point was, "The insured having in his application, in answer to question 23, 'How long since you have consulted any physician? For what disease? Give name and residence,' answered 'About one year, for light influenza, Dr. James W. Keiser, Reading, Pennsylvania,' and the plaintiff having, in the proof of death by

the affidavit of Dr. James W. Keiser, shown that during the five years preceding applicant's death he attended said applicant for vomiting and nausea, the effects of overdrinking, the duration being from twelve to thirty-six hours, and it being the uncontradicted evidence of said James W. Keiser that he had attended the said applicant within four months prior to the application and prescribed for vomiting and nausea induced by drunkenness, there can be no recovery in this case and the verdict must be for the defendant," and, the facts being substantially undisputed, the learned judge reserved the point, but subsequently entered judgment on the verdict. "Without going into other matters assigned for error, the facts admitted in this point show such a breach of a material warranty as to require the court to pass upon it as a matter of law." The judgment was reversed and judgment entered for the defendant on the point reserved.

In *United Brethren Mut. Aid Soc. v. White*, 100 Pa. St. 12, this court, Gordon, J., said: "In the application appear among others the following questions and answers: 'What is your age and occupation? Answer. Sixty-two years and four months.—Occupation, laborer. A. Are you married? B. Give name of consort. Answer. A.—. B. Widower.' These questions are very plain and simple, and such as anyone capable of entering into a contract might readily comprehend. They were also material, not only in themselves, but by the terms of the agreement, and the insurer had a right to expect straightforward and truthful answers, and so the court should have instructed the jury." We held that the questions as to both occupation and marriage were material, and that the court should have so instructed the jury, and should have left nothing to them except the truth or falsity of the answer. In both the cases, *Com. Mut. Fire Ins. Co. v. Huntzinger*, 98 Pa. St. 41, and *Blooming Grove Mut. Fire Ins. Co. v. McAnerney*, 102 Pa. St. 335, 48 Am. Rep. 209, the questions were as to the amount of other insurance, ⁶⁴⁵ which it was claimed were falsely answered, and the decisions were chiefly put upon the ground that the answers were warranties, but the materiality of the questions was assumed in both. In *Wall v. Royal Soc. of Good Fellows*, 179 Pa. St. 355, the questions and answers related to the health of the insured and the attendance of a physician. The judgment was reversed on the ground substantially that it was competent to the defendant company to prove the falsity of the answers without regard to the question whether they were warranties or only misrepresentations. Upon the foregoing

views we sustain the second, third, fourth, fifth, and sixth assignments of error.

We do not think that all the comments of the court covered by the eighth assignment are correct. They relate to the question as to the spitting of blood, the answer to which was "No," without any qualification. The learned court made a distinction between hemorrhages and other expectoration of blood, which was not called for by the question and answer. It was conceded in the charge that the question was material, and if falsely answered there could be no recovery. We do not think that an expectoration of blood which was so great as to amount to a hemorrhage could be properly excluded from the meaning and operation of the general question, "Have you ever spit blood?" We therefore sustain the eighth assignment. The answer to the defendant's second point should have been a categorical affirmance, and not an affirmance qualified by the remark, "If those questions were asked." Upon that subject there was no doubt whatever, because the questions and answers were a part of the application and necessarily were asked and were answered. It could only tend to confuse the jury to raise a question on that subject. The tenth assignment is therefore sustained. The same comment applies to the eleventh assignment and it is sustained for the same reason.

We are not prepared to sustain the twelfth assignment, as the deceased might have been afflicted with an entirely occult ailment altogether unknown to her, and in that event her failure to communicate it to the defendant would not be a fraud upon the company.

In answer to the defendant's fifth point, we think it was error to include the element of knowledge and intentional concealment of the assured, as essential to sustain the obligation to §46 make a true answer to the question. The question was as to the most fatal of all diseases, of the presence of which she could not be ignorant, and as the question was most material, and the answer was a warranty, the act of 1885 is not applicable. If the fact was as stated in the point the defendant was entitled to an unqualified affirmance. We therefore sustain the thirteenth assignment.

In the application for this policy the question was asked: "Q. Are you now insured? A. No." The application was signed by the plaintiff in this action as well as by his wife, and it was an absolutely false answer, and the plaintiff admitted on the witness stand that he knew she was insured by other poli-

cies. Yet the court, in answer to the defendant's sixth point, said the point was affirmed, but if the jury believed that the policy was taken out by the husband without his wife's knowledge, and that she did not sign the application, the point was not affirmed. On the trial, the plaintiff swore that he took out the policy, that he signed his wife's name and his own to the application, that he paid all the premiums, and that he knew at the time that there was other insurance on her life. This man is now seeking to recover on the policy for himself. The insurance money, by the terms of the policy, was to be paid to him if living after his wife's death, so that he, and he alone, is the person claiming to recover on the policy, and yet in answer to the defendant's sixth point, the learned court below charged the jury that it refused to affirm the point if the policy was taken out by the husband without the knowledge of the wife, and if she did not sign the application. We are entirely unable to see what the wife's knowledge on this subject had to do with the case. The answer was false, it was made by the plaintiff, it was material beyond all question, and the court so held, and it most assuredly barred a recovery. We sustain the fourteenth assignment. In *Com. etc. Ins. Co. v. Huntzinger*, 98 Pa. St. 41, we held that an untrue answer as to the amount of other insurance prevented a recovery.

We think the seventh point of the defendant was answered with substantial correctness, and therefore do not sustain the fifteenth assignment.

While there was considerable contradictory testimony as to some of the matters involved in this controversy, there are some ⁶⁴⁷ as to which there was none. The third and fourteenth assignments are sustained upon undisputed testimony, principally that of the plaintiff himself, and they are fatal to any recovery. The same is true of the fifth and sixteenth assignments. There was undisputed testimony that the insured did have most serious ailments prior to the application, that she was attended by several different physicians during the two or three years prior to the date of the policy, and almost up to the time the policy was issued, that she was at least threatened with consumption, and that she was not in sound health at the time of the application. Her husband, the plaintiff, testified that she was under treatment at the hospital for six or eight weeks in the latter part of 1892 and early part of 1893, and that she made use of an inhaling apparatus after her return, in the use of which he assisted her. During this time she was attended by Dr. Cohen, a dis-

tinguished specialist in throat and lung diseases, and this also is admitted by the plaintiff, proved by the testimony of Dr. Cohen and denied by nobody. On all these subjects the testimony is entirely undisputed, and the ailments for which she was treated were of the most serious and vital character. The answers upon these subjects were undoubtedly false, and we are therefore obliged to hold that the ninth assignment should be sustained and that a verdict should have been directed for the defendant as requested in the defendant's first point. It was distinctly proved by the testimony of Dr. Starr, and not at all contradicted, that he had rejected her application for insurance in another company, and that both she and Dr. Starr signed the certificate that she had been examined, and that Dr. Starr advised the company not to accept the risk because "by her own admissions she had been under treatment for lung disease for a year." This examination and certificate were made on January 31, 1894, and the policy in suit was made on June 28, 1894. Her husband, the plaintiff, admitted on the witness stand that he knew she had been rejected by an insurance company of Newark. As the answer to a part of the fifth clause of the application, which inquired if any other association had ever declined to insure her, was "No," it was thus established by undisputed testimony that the answer was absolutely false, and the question was most material.

Judgment reversed and judgment is now entered in favor of the defendant with costs.

INSURANCE—LIFE—REPRESENTATIONS AS TO HEALTH—MATERIALITY.—Where one asserts that certain statements are true, and, if not true, that this fact shall avoid a policy of insurance, the question whether they are actually material is not important, as the parties have the right to make their truth the basis of the contract, but if the applicant merely averred that they were true to the best of his knowledge and belief, then the policy cannot be avoided on account of them, unless he did not know or believe them to be true: *Cobb v. Covenant Mut. Ben. Assn.*, 153 Mass. 176, 25 Am. St. Rep. 619, and note. A policy of insurance is avoided by false answers of the insured as to his freedom from specific diseases without reference to their materiality as to the risk, as answers respecting specific ailments are warranties, whether material to the risk or not: *Mutual Life Ins. Co. v. Simpson*, 88 Tex. 833; 53 Am. St. Rep. 757, and note; as was held concerning an applicant's answers relative to hemorrhages and the extent of his use of intoxicating liquors: *Sweeny v. Metropolitan Life Ins. Co.*, 19 R. I. 171; 61 Am. St. Rep. 751; *Maine Ben. Assn. v. Parks*, 81 Me. 79; 10 Am. St. Rep. 240. As to the distinction between representations and warranties, see monographic notes to *Fowler v. Aetna Fire Ins. Co.*, 16 Am. Dec. 463-465; *Continental Life Ins. Co. v. Rogers*, 59 Am. Rep. 816-822.

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ACTIONS

1. ACTION—RIGHT OF, BY ONE IN POSSESSION, FOR INJURY TO PROPERTY.—One having the possession of property may maintain an action against a wrongdoer for an injury thereto, which cannot be defeated by showing the title to be in some one else than the plaintiff. (Sheridan Gas etc. Co. v. Pearson, 402.)

2. ACTIONS—TORT—VENUE.—For the purpose of redress, it is immaterial where a tort is committed, and, the wrong being personal, the action is transitory and may be brought in the jurisdiction where the wrongdoer may be found. (Meyers v. Chicago etc. Ry. Co., 579.)

3. ACTIONS FOR WRONGFUL DEATH—VENUE.—An action may be brought in the courts of one state for a wrongful act or omission occurring in another state by which death is caused, if the statute of the latter state gives a cause of action for such wrong. (Meyers v. Chicago etc. Ry. Co., 579.)

4. ACTION—WHEN DEEMED COMMENCED.—An action against a foreign corporation must be regarded as commenced within one year after the cause thereof accrued, if within that time a complaint is filed and a summons issued in good faith, though it is not served within the year, and the complaint does not state that the defendant is a foreign corporation nor disclose the names of its agents on whom process can be served. (Georgia Home Ins. Co. v. Holmes, 611.)

See Negligence, 4-7.

ADMIRALTY.

1. CONSTITUTIONAL LAW.—MARITIME LAWS CANNOT BE CONTROLLED BY THE CONSTITUTION AND STATUTES OF A STATE in opposition to an enactment by Congress. (Loughin v. McCaulley, 872.)

2. VESSELS—PRACTICE IN THE STATE COURTS.—If the owners of a vessel are sued in a state court for a liability alleged to have resulted from their negligence in the operation of a vessel, they should be permitted to show the value of such vessel and their respective ownerships therein, and the jury should be instructed to find the value of the vessel and the proportion of the ownership of the defendants, to the end that none of them should be held answerable beyond the value of his interest. (Loughin v. McCaulley, 872.)

3. VESSELS—THE STATE COURTS ARE CONTROLLED BY THE ACTS OF CONGRESS LIMITING THE LIABILITY OF

OWNERS OF VESSELS.—If such were not the case, it would be the duty of the state court, upon bringing an action therein seeking to enforce an alleged cause of action against the owner of a vessel, to decline to exercise jurisdiction thereof, if, by so doing, it would impose or enforce a liability forbidden by an act of Congress. (*Loughin v. McCaulley*, 872.)

4. DEATH OF HUMAN BEING—LIABILITY OF OWNERS OF VESSELS FOR.—The acts of Congress limiting the liability of the owners of vessels to their shares or interests therein apply to liabilities for causing the death of a human being through the negligent operation of such vessel. (*Loughin v. McCaulley*, 872.)

5. SHIPPING—LIEN ENFORCEMENT IN ADMIRALTY—JURISDICTION.—If a shipowner has a lien upon goods enforceable in the admiralty courts, the owner thereof cannot recover them by replevin in the state courts. (*Warehouse etc. Supply Co. v. Galvin*, 57.)

6. SHIPPING—LIEN FOR FREIGHT—ADMIRALTY JURISDICTION.—If a shipper fails to furnish or deliver to the vessel the full amount of goods which he has contracted to furnish or deliver, the lien of the vessel upon the goods so furnished or delivered is enforceable in admiralty, whether the action is treated as one to recover freight or to recover damages for the nonperformance of a contract. (*Warehouse etc. Supply Co. v. Galvin*, 57.)

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ADOPTION.

1. CHILDREN—ADOPTION OF.—The consent of the parents of a child is not necessary to its valid adoption by another, where the statute upon the subject is silent respecting the assent of the natural parents. (*Clarkson v. Hatton*, 635.)

2. AN ADOPTED CHILD IS, IN A LEGAL SENSE, THE CHILD BOTH of its natural and of its adopting parents, and is entitled to inherit from each as their child. (*Clarkson v. Hatton*, 635.)

3. AN ADOPTED CHILD IS NOT A BODILY HEIR.—Hence a conveyance to A. B. and his bodily heirs cannot, upon the death of A. B., vest any estate in his adopted child. (*Clarkson v. Hatton*, 635.)

ADVERSE POSSESSION.

1. ADVERSE POSSESSION BY PARENT AGAINST CHILD.—Possession of land acquired by a father under a conveyance made to his infant child, and delivered to him, can never be the foundation of, nor ripen into, a prescriptive title in his favor. (*Parker v. Salmons*, 291.)

2. ADVERSE POSSESSION BY PARENT AGAINST CHILD.—Possession of land acquired by a father, under a conveyance to his infant child, delivered to him, and continued long after such child reaches majority, does not ripen into a title by prescription in his favor, without any conveyance to him, or holding other than by virtue of his original entry. (*Parker v. Salmons*, 291.)

3. ADVERSE POSSESSION BY PARENT AGAINST CHILD.—Possession of land acquired by a father under a conveyance to his infant child, delivered to him, and continued long after such child attains majority, under a concealment from the grantee of the existence of such conveyance, together with the exercise of rights

of ownership by renting to the grantee a portion of the land while the latter has no knowledge of his title, does not sustain a claim of title by prescription so as to enable the father or his representative to recover, against the grantee, possession taken by the latter after acquiring knowledge of the existence of his title under such conveyance. (*Parker v. Salmons*, 291.)

See Ejectment, 4.

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AGENCY.

1. **PRINCIPAL AND AGENT.—ADMISSIONS** of an agent while he has the business in contest in hand are competent evidence against the principal. (*Albert v. Mutual Life Ins. Co.*, 693.)

2. **AGENCY—KNOWLEDGE OF AGENT AS KNOWLEDGE OF PRINCIPAL.**—If an agent knows, or by ordinary care can ascertain, the purpose for which implements contracted to be furnished are to be used, his knowledge is the knowledge of his principal. (*Neal v. Pender-Heyman etc. Co.*, 697.)

See Contracts, 12; Insurance, 59.

ANIMALS.

ANIMALS—BEES—RIGHT OF PROPERTY IN.—The mere finding of bees, in a bee tree, on another's land, gives the finder no right to them or to the tree. (*State v. Repp*, 463.)

APPEAL.

1. **APPELLATE PRACTICE.—ERROR NOT PREJUDICIAL** cannot work a reversal of the judgment. (*Farwell Co. v. Wolf*, 22.)

2. **APPEAL—ORDERS.**—An order of the superior court overruling a motion to dismiss an appeal from a justice's judgment is not appealable. (*Durham Fertilizer Co. v. Marshburn*, 708.)

3. **APPEAL—WHAT CANNOT BE FIRST RAISED ON.**—An objection to a departure from the cause of action stated in the complaint cannot be raised, for the first time, in the appellate court. (*Mills v. Hart*, 241.)

4. **APPELLATE PROCEDURE—HARMLESS ERROR.**—If a court refuses to permit the defendant to amend his answer, but nevertheless receives evidence upon all the issues tendered by the proposed amendment and gives such evidence full consideration, no injury can have resulted from such refusal. (*Pacific R. M. Co. v. Bear Valley Irrigation Co.*, 158.)

5. **APPEAL—TESTING COMPLAINT FOR THE FIRST TIME ON.**—The question as to the sufficiency of a complaint, which omits the statement of a material fact essential to a right of recovery, may be raised for the first time on appeal. (*Metropolitan Life Ins. Co. v. McCormick*, 392.)

6. **APPEAL—WHAT STATEMENT BY COURT IS NOT REVERSIBLE ERROR.**—If witnesses are absent when they are called to testify, during the trial of a cause, it is improper; but not reversible error, for the court to remark, in the presence of the jury, "I do not feel disposed to keep this jury waiting at the expense of the county to suit the convenience of saloonkeepers and gentlemen of elegant leisure." (*Frankfort v. Coleman*, 412.)

7. **APPEAL—CONFLICTING EVIDENCE.—THE VERDICT OF A JURY** will not be disturbed on appeal, where the evidence is conflicting, if there is some evidence to support it, no matter what

the appellate tribunal may think about the preponderance of the evidence. (*Frankfort v. Coleman*, 412.)

8. APPEAL—REVIEW OF FINDING OF FACT—CONFLICTING EVIDENCE—DEPOSITIONS.—If there is any legal and competent evidence to support a finding of fact, it is a general rule that the judgment will not be disturbed, though the evidence is conflicting. The fact that some of the evidence is in the form of depositions does not make it the duty of the court to sift the evidence to determine on which side it preponderates, where the larger and more material part of the evidence is oral testimony, and the court cannot say that the finding is wrong. The general rule, at most, is modified only as to the depositions. (*Lathrop v. Tracy*, 229.)

9. APPEAL—QUESTIONING FACT DECLARED OR ADMITTED.—An express statement or admission by a party in a pleading, as that a will left a life estate in certain real property to a person named, cannot be questioned by him on appeal. (*Floete v. Brown*, 434.)

10. APPEAL—AFFIRMATIVE RELIEF—WHEN DEFENDANT CANNOT CLAIM ON PLAINTIFF'S APPEAL.—Upon an appeal by the plaintiff from a denial of his request for a nunc pro tunc order requiring the clerk to record a former decree, the defendant can claim no affirmative relief by reason of a motion made by himself for leave to answer, where no ruling was made upon such motion, and he took no appeal. (*Day v. Goodwin*, 465.)

11. JUDGMENTS REFUSING TO DISMISS ACTIONS ARE NOT APPEALABLE.—The remedy is to note an exception to the refusal to grant the motion to dismiss and have it considered an appeal from the final judgment. (*Cooper v. Wyman*, 731.)

12. APPEAL, WHERE PART ONLY OF RELIEF PRAYED FOR IS GRANTED.—If a court, in express words, grants a part of the relief prayed for, the effect of the judgment is to deny the other part of such relief, although there are no express words of denial. Hence, on appeal from the judgment rendered, the plaintiff may have considered his right to the relief denied. (*Floete v. Brown*, 434.)

13. APPEAL.—QUESTIONS OF JURISDICTION may be raised at any time and in any court where the case is pending. A motion to dismiss an appeal from a justice's judgment, based on want of proper service of process, may be made at any time in the superior court. (*Durham Fertilizer Co. v. Marshburn*, 708.)

14. APPEAL—JURISDICTION.—If a justice of the peace has not obtained jurisdiction of a party by reason of the nonservice of process in a matter in which he has exclusive original jurisdiction, the superior court cannot, on appeal, obtain jurisdiction of such party by ordering a summons to issue to bring him before it. The superior court cannot create original jurisdiction on appeal. (*Durham Fertilizer Co. v. Marshburn*, 708.)

15. APPELLATE PROCEDURE.—IF A JOINT ASSIGNMENT OF ERROR is made by a husband and wife, it will be held good as to both if good as to the wife. (*Magel v. Milligan*, 382.)

16. APPELLATE PROCEDURE—WHEN NOT CONTROLLED BY THE PROBATE PROCEDURE ACT.—Where the remedy sought by or against an estate is not provided by the probate procedure act, but must be enforced under the Civil Code, an appeal is governed by such code. Therefore, where the proceeding is to obtain a writ of assistance to place a purchaser in possession, the appeal may be taken within the time allowed by the Civil Code. (*Roach v. Clark*, 353.)

17. APPELLATE PRACTICE.—The action of a trial court in refusing to set aside a verdict as against the weight of evidence will

not be reviewed unless so manifestly wrong as to amount to a clear abuse of judicial discretion, and this occurs ordinarily only when there has been practically no proper evidence which, if believed, would support the verdict. (*Maitland v. Gilbert Paper Co.*, 187.)

18. APPELLATE PROCEDURE.—A BILL OF EXCEPTIONS settled for one purpose may be used for another. Hence, though it was presented and settled for the purpose of being used on a motion to vacate a judgment, it constitutes a part of the record on appeal from such judgment, and may require its reversal, if thereby error, prejudicial to the appellant, is disclosed. (*Foley v. Foley*, 147.)

19. APPEAL—COMPLIANCE WITH RULES OF COURT.—Alleged errors, based upon the admission or rejection of evidence, cannot be considered, though argued by counsel, where no assignment of error has been predicated thereon as required by a rule of the supreme court. (*Lathrop v. Tracy*, 229.)

20. APPEAL—ABSENCE OF EVIDENCE—FINDINGS OF COURT—PRESUMPTION.—It will be presumed, on appeal, where the record does not contain the evidence, that it was sufficient to sustain the findings of the court. (*Hopkins v. Burr*, 238.)

21. APPEAL—ADMISSION OF EVIDENCE—WHAT IS NOT PREJUDICIAL ERROR.—In a statutory action by a wife against her husband for a failure to support her, the admission of a copy of a decree of a court of a sister state, though improperly attested, to establish the relationship of husband and wife between the parties, such decree showing that they were marriageable on a certain date, and that they were, on that date, married, is not prejudicial error, where there is other evidence which conclusively establishes the relationship. (*Poole v. People*, 245.)

22. APPEAL.—UNDER THE DOCTRINE OF THE "LAW OF THE CASE," the conclusions announced by an appellate court upon the review of a case are, on a second appeal, *res judicata* as to the points decided, unless a new and different state of facts has been established on the new trial. (*Smith v. Smith*, 251.)

See Judgments, 16; Trial, 1.

ASSIGNMENT.

1. ASSIGNMENTS.—A CAUSE OF ACTION FOR DAMAGES arising from a conspiracy to defraud, by purchasing and selling goods without paying for them, is not a cause for damages done to personal property, and hence is not assignable. (*Farwell Co. v. Wolf*, 22.)

2. AN ASSIGNEE OF A CONTRACT FOR THE PURCHASE OF LAND is not personally liable for the unpaid purchase price, though the contract of sale and purchase provides that its stipulations shall apply to, and bind, the heirs, executors, administrators, and assigns of the respective parties. The covenant on the part of the purchaser is personal, and hence the assignee cannot be charged with its performance. (*Lisenby v. Newton*, 203.)

3. ASSIGNMENT OF LEASE—NOTICE OF MECHANIC'S LIEN—PROTECTION OF ASSIGNEE.—If one takes a lease of a life estate without actual notice of a mechanic's lien for materials furnished, and assigns the lease for value, the lien of the leasehold interest, as to him, is prior to the mechanic's lien, and the assignee is protected, as the assignor would be, notwithstanding any actual knowledge the assignee may have had. (*Floete v. Brown*, 484.)

See Corporations, 4; Executions, 11; Mortgage, 7, 8.

ASSUMPSIT.

See Usury, 1.

ATTACHMENT.

1. GARNISHMENT.—INDEBTEDNESS IS NOT LIABLE to garnishment unless it is absolutely due as a money demand, unaffected by liens, prior encumbrances, or conditions of contract, and except in case of fraud, the creditor cannot claim any higher rights against his garnishee than the debtor could claim against him. (*Holker v. Hennessey*, 642.)

2. GARNISHMENT—PROPERTY RECEIVED BY GARNISHEE AFTER SERVICE.—Under a statute providing that the service of the summons upon the garnishee shall attach and bind all property belonging to the defendant in his hands at the date of such service, the garnishee cannot be held for property coming to his possession or control after the time of the service of the summons in the proceedings against him, although it comes into his possession or control on the same day as the service. Such statute cannot be construed as if it read, "during the day of such service." (*McLean v. Sworts*, 556.)

3. GARNISHMENT.—WHERE MONEYS ARE DEPOSITED with a third person to secure him from loss for becoming security on a bail bond, such moneys are not subject to garnishment on the ground that such bond is for some reason void. Its validity cannot be determined in the garnishment proceedings. (*Holker v. Hennessey*, 642.)

4. GARNISHMENT—JUDGMENT UPON DISCLOSURE.—If judgment is asked against the garnishee, upon his disclosure, which is not evasive, it cannot be granted if the disclosure does not affirmatively show the liability of the garnishee. (*McLean v. Sworts*, 556.)

5. GARNISHMENT—QUESTIONS WHICH MAY BE TRIED UPON.—In a proceeding by garnishment, where the person garnished admits having in his possession the moneys garnished, but claims that they do not belong to the defendant in the writ, but have been by him transferred to another, the court, if the plaintiff claims this transfer to be fraudulent and void as against him, has power to try and determine this issue. (*People's Bank v. Smith Bros. & Co.*, 618.)

6. MOTION FOR NUNC PRO TUNC ORDER — AFFIDAVITS IN ATTACHMENT AND GARNISHMENT.—If, while the sufficiency of affidavits in attachment and garnishment is under consideration by the court, additional affidavits are simply filed with the clerk, and the former are subsequently held to be insufficient, a motion for a nunc pro tunc entry, showing that such additional affidavits were so filed as of a prior date, is properly overruled, where the additional affidavits could only have been properly filed in open court and by leave of the court. (*Teutonia Loan etc. Co. v. Turrell*, 419.)

7. ATTACHMENT AND GARNISHMENT—PROCEEDINGS IN, ARE DEPENDENT UPON SUFFICIENT AFFIDAVITS.—After affidavits in attachment and garnishment have been held insufficient, no subsequent proceedings, based on such affidavits, are valid until new and sufficient affidavits are filed. (*Teutonia Loan etc. Co. v. Turrell*, 419.)

8. GARNISHMENT.—A FOREIGN INSURANCE COMPANY cannot be garnished in a state where it does business through an agent, by a resident thereof on account of its indebtedness to a nonresident defendant, arising from a loss occurring in another state, especially where under the statute such defendant cannot maintain an action on his claim within the state. The voluntary appearance of such defendant in the main action does not confer jurisdiction in the garnishment proceeding. (*Morawetz v. Sun Ins. Office*, 43.)

9. GARNISHMENT—FOREIGN CORPORATIONS.—A NON-RESIDENT CREDITOR cannot have his property in a debt seized in a state to which the debtor corporation may resort merely for the purpose of doing business through agents, when the claim arises on a contract not to be performed within the state, and the debtor does not reside therein. A debt has no situs for the purpose of garnishment in a state of which the plaintiff, the defendant, and the garnishee are all nonresidents, although the latter is a foreign corporation which, by general provisions of a state statute, is subject to garnishment in such state. (*Morawetz v. Sun Ins. Office*, 43.)

10. PARTIES.—IN A SUIT FOUNDED UPON a garnishment, it is not necessary to make either the judgment debtor or his debtor parties, where the object of the suit is to reach property or moneys transferred to the defendant therein by the judgment debtor. (*Hazelton v. Douglas*, 122.)

See Executions, 11.

ATTORNEY AND CLIENT.

1. ATTORNEY AND CLIENT—RELATION OF, WHEN DIS-SOLVED BY OPERATION OF LAW.—If a member of a law firm accepts the office of judge of a court, that, so far as he is concerned, effects a termination by operation of law, of the relation of attorney and client. (*Justice v. Lairy*, 405.)

2. ATTORNEY AT LAW—DIVISION OF FEES AFTER DIS-SOLUTION OF FIRM.—If an attorney at law, who, is a member of a law firm, becomes a judge of a court, his contract of employment in pending business is of a divisible nature, under which he may recover for services of which the client has already had the benefit, but he has no interest in any fees for services rendered by the remaining member of the firm in concluding that particular business. (*Justice v. Lairy*, 405.)

3. ATTORNEYS AT LAW—PARTNERSHIP BETWEEN, DIS-SOLUTION OF, BY OPERATION OF LAW.—If a member of a law firm accepts the office of judge of a court, that act effects an immediate dissolution of the firm by operation of law, whether his co-partners consent to his withdrawal from the firm or not. (*Justice v. Lairy*, 405.)

4. ATTORNEYS—PRIVILEGED COMMUNICATIONS.—Where an attorney represents all the parties in the settlement and adjustment of a controversy, he will not, in a dispute between them and a third person, be compelled to disclose any communication made to him by any of them while in the exercise of such professional employment; but in a dispute between his former clients themselves, he is not prohibited from making disclosure of anything communicated in the presence of all concerned or intended for the information of all. (*Minard v. Stillman*, 815.)

5. ATTORNEYS—PRIVILEGED COMMUNICATIONS.—Where a controversy arises between an attorney and one of his former clients, he cannot shield himself from testifying on the ground that to do so would be a breach of professional confidence. Hence, where an attorney representing a person having a claim against an insurance corporation admits receiving the amount thereof, and claims to have paid certain portions of the moneys so received by him to various parties, he cannot, in an action against him by his client to recover the moneys thus received, refuse to testify to whom such payments were made, on the ground that it is a matter of professional confidence between himself, his client, and such parties. (*Minard v. Stillman*, 815.)

ATTORNEY'S FEES.

See Interest, 2; Judgment, 85.

BANKS AND BANKING.

1. BANKS AND BANKING—APPLICATION OF DEPOSIT ON NOTE.—A bank holding money on an open account to the credit of a maker of a note held by it is not compelled to apply the money thereon before bringing suit. (*Docter v. Riedel*, 40.)

2. BANKS AND BANKING—CHECKS—LIABILITY OF DRAWEE.—The drawee of a check, draft, or bill of exchange is held to know the signature of the drawer, and makes payment at his own peril in case of forgery or otherwise. (*First Nat. Bank v. First Nat. Bank*, 748.)

3. BANKS AND BANKING—CHECKS—FORGERY—INDORSEMENT FOR COLLECTION—NEGLIGENCE.—If the drawer of a check indorsed "for collection" has no individual account with the bank upon which it is drawn, but has an account in a trust capacity, it is negligence in the bank to pay the check and charge it to such trust account; and in case the check turns out to be a forgery, it must stand the loss. (*First Nat. Bank v. First Nat. Bank*, 748.)

4. BANKING—CHECK FORGED BY THE AID OF A RUBBER STAMP.—A bank paying a check forged by the aid of a rubber stamp fac simile of the depositor's signature is liable to him for the amount so paid out, unless he was guilty of negligence whereby the forger obtained possession of the stamp. (*Robb v. Penn. Co. for Ins. of Lives, etc.*, 868.)

5. BANKS AND BANKING—CHECKS.—INDORSEMENT "FOR COLLECTION" on negotiable paper, is notice to the drawee, and indicates on its face that the indorser remains the owner, and that his successive indorseees are only his agents for the sole purpose of collecting the paper and remitting the proceeds to him. (*First Nat. Bank v. First Nat. Bank*, 748.)

6. BANKS AND BANKING—CHECKS—INDORSEMENT FOR COLLECTION—GUARANTY.—The indorsement of a check, draft, or bill of exchange "for collection," by other than the payee, is not a guaranty that the name of the drawer is genuine, but only of the genuineness of the names of the indorsers. (*First Nat. Bank v. First Nat. Bank*, 748.)

7. NEGLIGENCE—RUBBER STAMP CONTAINING A FAC SIMILE OF A SIGNATURE.—The obtaining of a rubber stamp fac simile of one's signature is not unlawful nor necessarily negligent, and does not impose upon him the duty of informing a bank in which he had a deposit of the existence of such stamp, nor justify the bank in paying a check upon which such stamp had been impressed without authority by one who had obtained possession thereof without any negligence on the part of such depositor. (*Robb v. Penn. Co. for Ins. of Lives, etc.*, 868.)

8. BANKS AND BANKING—CRIMINAL RECEIPT OF DEPOSIT.—Although a portion of the money for which a certificate of deposit is issued by a bank consists of that represented by a prior certificate of deposit against the same bank and surrendered at the time that the last deposit is made, the last deposit and the certificate therefor must be treated as if the whole amount had been deposited in cash. (*State v. Shove*, 17.)

9. BANKS AND BANKING—RECEIPT ON DEPOSIT, WHAT IS.—If a certificate of deposit is issued by a bank for money received, payable in one year, with interest, and not subject to check, the money is received on deposit within the meaning of a statute making it a crime for an officer of a bank to accept or receive money on

deposit if he knows, or has reason to know, that the bank is unsafe or insolvent. (State v. Shove, 17.)

10. **BANKS AND BANKING.—TO PROVE THE INSOLVENCY OF A BANK** at the time a deposit was made, evidence is admissible of the amount of deposits in the bank, including those for which certificates not yet due have been issued and of indebtedness due to the bank and its value as part of the assets. (State v. Shove, 17.)

See Corporations, 6, 8; Limitations of Actions, 11.

BEES.

See Animals; Larceny.

BENEFICIAL ASSOCIATIONS.

See Insurance.

BEQUESTS FOR MASSES.

See Charities, 2; Trusts, 4, 5.

BILL OF EXCEPTIONS.

See Appeal, 18.

BONA FIDE PURCHASER.

See Mechanic's Lien, 2.

BONDS.

BONDS—ABSENCE IN, OF SPECIFIC PROVISIONS—AUTHORITY OF COURT.—If a statute makes it unlawful for a husband to willfully neglect, fail, or refuse to support his wife, and authorizes the acceptance of a bond conditioned for the support of the wife for six months, in lieu of the penalty, but does not provide a penalty for the bond, and does not fix the amount or time of payments for the wife's support, the court has authority, in a prosecution under such a statute, to provide a penalty for the bond, and to make specific provisions as to when payments shall be made to the wife, as well as their amount. (Poole v. People, 245.)

BUILDING AND LOAN ASSOCIATIONS.

1. **BUILDING AND LOAN ASSOCIATIONS—FORFEITURE OF SHARES—ESTOPPEL.**—Members holding shares in a mutual building association who default in the payment of their monthly installments of dues are presumed to assent to the unauthorized act of the directors in absolutely forfeiting their shares and the money paid in thereon, without sale and without notice, shortly after their default, and in appropriating the money so paid in for the benefit of members in good standing, when such members wait for more than four years after such forfeiture and after the distribution of such money in good faith, before they take any steps to protect their interests. In such case, the defaulting members and their assignee who brings the suit are estopped from denying that they have assented to or ratified the unlawful act of the directors. (Barton v. Pioneer Savings etc. Co., 549.)

2. **BUILDING AND LOAN ASSOCIATIONS—UNAUTHORIZED ACT OF DIRECTORS—ESTOPPEL OF SHAREHOLDERS.** It is inequitable for a shareholder, in a mutual building association, knowing that an act done by the directors in good faith for the benefit of the association, such as the unlawful forfeiture of his shares for delinquency in payments, is in fact unauthorized, to apparently acquiesce by his silence, but secretly reserve an option

to repudiate the act in case of loss, or to enjoy its benefits if it proves profitable. Fairness requires that the dissenting shareholder should act promptly and make known his objections without unreasonable delay. If he fails to do so, his assent to the unauthorized act must be presumed, and he is estopped from denying that he has assented to or ratified such act. (*Barton v. Pioneer Savings etc. Co.*, 549.)

BUILDING CONTRACTS.

See Contracts.

BURDEN OF PROOF.

See Ejectment, 8; Guardian and Ward, 2; Limitations of Actions, 2.

CARRIERS.

1. CARRIER OF PASSENGERS.—A BLIND MAN CANNOT LAWFULLY BE EXCLUDED from a railway train because he is not attended by any assistant. (*Zachery v. Mobile etc. R. R. Co.*, 617.)

2. CARRIERS OF LIVESTOCK—DESTRUCTION OF ANIMALS—NO RECOVERY, WHEN.—If the evidence, in an action to recover the value of horses and other property burned on the defendant's train, clearly shows that, at a certain station, where the train stopped, the plaintiff, who was the shipper and who, by the contract, was to accompany the stock, left the caboose to go to the stock-car but was not thereafter seen on the train, there is no right of recovery, although the plaintiff claims to have been left at such station, where his reputation for truth and veracity is bad, where some of his testimony is unreasonable and some of his statements untrue, where he seeks to recover for more horses than carcasses were found in the car, and where it appears that he, himself, was answerable for the fire which destroyed his property. (*Faust v. Chicago etc. Ry. Co.*, 454.)

3. CARRIERS OF LIVESTOCK—SHIPPING RECEIPT—IMMATERIAL EVIDENCE—HARMLESS ERROR.—In an action to recover for property lost during the course of shipment, the admission of immaterial evidence that the plaintiff did not have time to read the shipping contract before signing it, is not prejudicial to the defendant, if the court's instructions treat the contract as in force, and require the jury to so consider it. (*Faust v. Chicago etc. Ry. Co.*, 454.)

4. CARRIERS OF LIVESTOCK—READING SHIPPING RECEIPT—INADMISSIBLE EVIDENCE.—In an action to recover the value of horses and other property lost by fire while being transported over the defendant's road, evidence that the plaintiff did not have time to read the shipping contract before signing it is not admissible under an averment of the petition that, after the property was loaded, the defendant's agent presented the contract to the plaintiff, and requested him to sign it; and that the plaintiff understood the paper to be a pass, to carry him to the place of delivery. (*Faust v. Chicago etc. Ry. Co.*, 454.)

5. CARRIERS OF LIVESTOCK—DESTRUCTION OF ANIMALS—RECOVERY.—If livestock are shipped under a contract which does not require the shipper to ride in the car carrying the stock but in the caboose, and such stock are destroyed by the burning of the car in which they are transported, the shipper may recover on proof that the fire was not due to any act or negligence on his part, unless there is proof that the loss was not caused by his

failure to remain on the train, or by his failure to care for the stock while in transit. (Faust v. Chicago etc. Ry. Co., 454.)

See Contracts, 7.

CHARITIES.

1. TRUSTS, TO BE CHARITABLE, must be of such a clear and definite nature that a court of equity may deal with them in the exercise of its ordinary functions and render them effective. (McHugh v. McCole, 106.)

2. LEGACIES—BEQUEST FOR MASSES IS VALID—PRIVATE TRUST.—A bequest to a Catholic priest, who is the pastor of a particular church, "that masses may be said for me," is not a charity, but the bequest is, nevertheless, valid, and creates a valid private trust, if the priest accepts the money. (Moran v. Moran, 443.)

3. CHARITABLE TRUSTS—UNCERTAINTY.—A bequest of property to be used by a Roman Catholic bishop of the diocese of G., for the benefit and behoof of the Roman Catholic church, is void for uncertainty. (McHugh v. McCole, 106.)

4. CHARITABLE USES OR TRUSTS—WHEN VOID FOR UNCERTAINTY.—A bequest of money "to be divided among the sisters of charity," is void for uncertainty where there is no limitation as to locality, state, or nation, and no discretion vested in a trustee. (Moran v. Moran, 443.)

5. CHARITABLE TRUSTS—FATAL UNCERTAINTY IN.—A bequest of a sum of money to the bishop of F., to be used by him for the benefit and behoof of the Protestant Episcopal Church of F., such church not being a corporate body or legal entity capable of taking the fund, but consisting of several churches or organizations, is void for uncertainty. The court cannot determine as to which of the churches or what members thereof shall participate in the testator's bounty. (McHugh v. McCole, 106.)

6. CHARITABLE USES OR TRUSTS—UPHOLDING OF—BEQUESTS TO SISTERS OF CHARITY.—It is competent for a testator to bestow a charity on a person or institution to be chosen by a trustee or executor, and such a bequest will be upheld; but bequests are not limited to a charitable use or purpose, and a bequest to the sisters of charity, if certain, is valid, though it contains no element of a charitable use. (Moran v. Moran, 443.)

7. TRUSTS—CHARITABLE USES—DEVISE TO UNINCORPORATED SOCIETY—CERTAINTY OF BENEFICIARY.—An unincorporated voluntary association constituting a branch of the Salvation Army, whose membership is fluctuating and uncertain, cannot be the beneficiary of a trust under a statute requiring such beneficiary to be certain or capable of being rendered certain. (Lane v. Eaton, 559.)

8. TRUSTS—DEVISE TO UNINCORPORATED SOCIETY—INCORPORATION IN ORDER TO TAKE.—Incorporation within a reasonable time may make an unincorporated voluntary association, constituting a local branch of the Salvation Army, competent to become the beneficiary of a trust created by will, under a statute providing that on the incorporation of a religious society, any estate devised in trust for it shall vest in the corporation as fully as if it had been legally incorporated from the date of its religious organization. Such reasonable time within which to incorporate does not extend beyond the time for the hearing of the application for the decree of distribution under the will creating the trust. (Lane v. Eaton, 559.)

9. CHARITABLE USES—DEVISE, WHEN ABSOLUTE GIFT. A devise of the "rest, residue, and remainder of my estate," to a named church, "absolutely to be used by said church or its trustees in aiding the cause of home and foreign missions equally," is an absolute valid gift to the church and not a devise in trust, when such church is incorporated and authorized by statute to acquire property by gift for mission purposes, and to accept any gift in trust for the purposes for which it is given. (Lane v. Eaton, 559.)

10. PERPETUITIES—ABROGATION OF RULE AGAINST.—The rule against perpetuities, so far as it applies to a trust to establish and maintain a meeting-house for a religious society, is abrogated by statute in Minnesota. (Minn. Gen. Stats., sec. 8040.) (Lane v. Eaton, 559.)

CHECKS.

See Banks and Banking, 2.

CIGARETTES.

See Interstate Commerce, 2, 3, 5, 8.

CLASS LEGISLATION.

See Statutes, 3-6.

COLLATERAL ATTACK.

See Corporations, 2; Executions, 4; Judgment, 12, 22.

COLLATERAL SECURITY.

See Negotiable Instruments, 2, 6.

COLORED PERSONS, RIGHTS OF.

See Master and Servant, 2.

CONFESSIONS.

See Evidence, 10, 11.

CONSIDERATION.

See Negotiable Instruments, 6-8; Vendor and Purchaser.

CONSPIRACY.

See Assignment, 1; Corporations, 4.

CONSTITUTIONAL LAW.

1. CONSTITUTIONAL LAW—PEDDLERS.—The business of hawking or peddling is inherently moral and legitimate in itself, and the legislature can regulate it only for the purpose of preventing it from becoming a nuisance. (State v. Wagener, 565.)

2. CONSTITUTIONAL LAW—RIGHT TO REGULATE LABOR. The natural right to labor and enjoy its fruits is subject to reasonable legislative regulation, but cannot be unreasonably interfered with. (State v. Gardner, 785.)

3. CONSTITUTIONAL LAW—REGULATION OF BUSINESS OR PURSUIT.—If the reasonable regulation of a business or pursuit may naturally be expected to promote the health of a community, or relieve of dangers to health which otherwise might follow its careless exercise, it cannot be said that such regulation interferes with the natural right to labor, or unreasonably prevents its exercise. (State v. Gardner, 785.)

See Admiralty, 1; Police Power.

CONTEMPT.

1. A CRIMINAL CONTEMPT IS ANY ACT DONE TO OBSTRUCT THE COURSE of justice or to prejudice the trial of any action or proceeding then pending in court. (State v. Circuit Court, 90.)

2. COURTS—CONTEMPT.—The power of courts of superior jurisdiction to punish contempt is inherent and arises by implication from the creation of the courts. This power may be regulated, and the manner of its exercise prescribed, by statute, but it cannot be taken entirely away, nor can its sufficiency be so impaired or abridged as to leave the court without the power to compel the due respect and obedience essential to preserve its character as a judicial tribunal. (State v. Circuit Court, 90.)

3. COURTS, CONTEMPT OF.—Newspaper comments on the action of a judge in cases finally decided prior to their publication cannot be considered criminal contempts. (State v. Circuit Court, 90.)

4. COURTS, CONTEMPT OF—FALSE PUBLICATION.—Though a statute declares that a contempt of court may be committed by the publication of a false or grossly inaccurate report or copy of its proceedings, a commitment for contempt cannot be sustained when founded upon a charge that the accused published of the judge then presiding in court that his decisions, in certain cases before then finally determined, had been influenced by partiality and corrupt motives, if such charge does not further state that the reference thus made to the proceedings of the court was in some respect false or inaccurate. (State v. Circuit Court, 90.)

5. CONTEMPT OF COURT ALLEGED TO HAVE BEEN COMMITTED IN ANSWERING AN ORDER TO SHOW CAUSE.—If matters charged against one accused of contempt of court are not punishable as such, because they did not occur in the presence of the court, the filing of an affidavit in response to an order to show cause averring the truth of the publication complained of cannot be punishable as such, because they did not occur in the presence of the court. (State v. Circuit Court, 90.)

6. CONTEMPT—SERVICE OF ORDER ISSUED IN PROCEEDINGS FOR, WHEN NEED NOT BE PERSONAL.—If it appears that a litigant against whom an order to show cause why he should not be punished for a contempt of court has been issued is concealing himself to avoid compliance with the orders of the court and the service of its process, the court may direct that the order to show cause may be served on his attorneys of record. (Foley v. Foley, 147.)

7. COURTS, CONTEMPT OF—DISPARAGING REMARKS RESPECTING THE JUDGE.—One publishing of a judge, who is a candidate for re-election, a charge that he has been corrupt and intentionally partial in certain cases, which, however, have been finally determined, may be guilty of libel of the judge, but not of contempt of court, though such publication occurs while the judge is presiding in court in the discharge of his duties, and jurors and litigants are in attendance thereon. (State v. Circuit Court, 90.)

8. CONSTITUTIONAL LAW, STRIKING OUT ANSWER OF PERSON IN CONTEMPT.—A contempt of court, whether in refusing to subscribe a deposition or in any other matter, cannot justify the striking out of the answer of the defendant and the taking of judgment against him as by default. The contempt must be punished in some other mode. Whether in contempt or not, every citizen has the right, of which no court can deprive him, to be heard before being deprived of property or personal rights. To

strike out his answer amounts to taking his property without due process of law. (Foley v. Foley, 147.)

See Prohibition.

CONTRACTS.

1. CONTRACTS — UNDERSTANDING OF PARTIES — EVIDENCE.—If the terms of an instrument are not ambiguous, the testimony of the parties as to how they understood it, is inadmissible. (Pratt v. Prouty, 472.)

2. CONTRACTS — UNDERSTANDING OF PARTIES — EVIDENCE.—The best evidence of how the parties to an agreement understood its terms is afforded by their acts under it, and these may be shown to aid the court in arriving at a proper interpretation. (Pratt v. Prouty, 472.)

3. CONTRACTS — UNILATERAL AGREEMENT TO SELL STOCK—CONSTRUCTION OF OPTION.—If one of the stockholders in a corporation agrees to sell to other stockholders therein enough stock to reduce the former's holding to one-third of the whole capital stock, in amounts of ten thousand dollars, at the end of each business year, after a dividend has been declared and paid on the stock, the agreement is unilateral and will be construed to mean that the sum stated is merely the one fixed as the greatest amount of stock that can be demanded in any one year, particularly where such construction seems to accord with the understanding of the parties. (Pratt v. Prouty, 472.)

4. CONTRACTS—EXERCISE OF OPTION TO PURCHASE STOCK—CONSENT OF PARTIES JOINTLY INTERESTED.—If one of the stockholders in a corporation agrees to sell to other stockholders therein a specified amount of stock, in the number of shares to each that they may agree upon, the consent of all the persons having an interest in such option is necessary to its exercise by any one of them, and this requires the consent of an interested party who has sold his stock in the corporation, for he is still a party to the agreement. (Pratt v. Prouty, 472.)

5. CONTRACTS—ABBREVIATIONS—PAROL EVIDENCE TO EXPLAIN.—Parol evidence is admissible to show that abbreviations, and apparently ambiguous statements of description and price contained in a contract, have a recognized meaning in the trade or business to which the contract relates, and hence that they are a sufficient statement of the terms of the contract to take it out of the operation of the statute of frauds. Such evidence neither varies nor adds to the written memorandum, but merely translates it from the language of the trade into the ordinary language of the people generally. (Maurin v. Lyon, 568.)

6. INDEPENDENT CONDITIONS, WHEN BECOME DEPENDENT.—If a contract contains stipulations which are not concurrent nor dependent, but one of the parties makes default in an act required to be performed by him by the conditions of his contract, all the preceding agreements of the contract remaining unperformed by him must be treated by him as concurrent, since he cannot enforce performance while himself in default. (Russ Lumber etc. Co. v. Muscuplabe Land etc. Co., 186.)

7. CONTRACTS OF CARRIAGE—ENTIRETY.—A contract to carry a specific number of barrels of salt between certain points for a specific amount of freight per barrel is an entire contract. If only a part is delivered for shipment, the carrier is entitled to a lien thereon at the place of delivery for the entire contract price of the freight. (Warehouse etc. Supply Co. v. Galvin, 57.)

8. CONTRACTS.—AN AGREEMENT TO INSURE machinery and buildings on the leased premises for a certain sum, payable to the lessor as his interest shall appear, is satisfied by procuring insurance on the buildings and machinery for more than the sum required, although the machinery belongs to the lessee, the lessor having a lien thereon for unpaid rent. In case of loss to the building, the lessor can recover only the amount for which it is insured, though that is less than its full value. (*Guetzkow Bros. Co. v. Breese*, 83.)

9. THE RESCISSION OF A CONTRACT IS NOT REQUIRED where nothing of value has been received under it and the party making it cannot perform it. (*Russ Lumber etc. Co. v. Muscupiabe Land etc. Co.*, 186.)

10. CONTRACTS—WHEN MAY BE AVOIDED FOR FAILURE OF THE PROMISEE TO PERFORM AN ACT IN THE FUTURE. If the promise to do an act is accompanied with statements of existing facts showing an ability of the promisor to perform his promise, such statements are called representations, and if falsely made, are grounds for avoiding the contract, though the promise to be performed lies wholly in the future. (*Russ Lumber etc. Co. v. Muscupiabe Land etc. Co.*, 186.)

11. CONTRACTS—BREACH—MEASURE OF DAMAGES.—If one violates his contract, he is liable for such damages as are caused by the breach, and such as may reasonably be presumed to have been in the contemplation of the parties at the time that the contract was made. (*Neal v. Pender-Heyman etc. Co.*, 697.)

12. CONTRACTS—BREACH—AGENCY—DAMAGES.—A manufacturer who makes, and his agent who sells, flues for curing tobacco in a locality where tobacco is cultivated, are presumed to know that if it is not cut and cured in apt time serious loss is the necessary consequence, and the principal is liable for such loss caused by the breach of a contract made by his agent to furnish flues for the curing of such tobacco. (*Neal v. Pender-Heyman etc. Co.*, 697.)

13. STATUTE OF FRAUDS—SURETIES—CONTRACTS BETWEEN.—Agreements between cosureties fixing the respective liability of each are not within the statute of frauds. (*Rose v. Wollenberg*, 826.)

14. CONTRACT.—THE DEFENSE OF THE UNLAWFUL ACT OF THE PARTY INTERPOSING IT is not favored. Hence, if the defendant seeks to avoid the specific performance of a contract on the ground that it is against public policy, he must clearly show such to be the case. (*Conemaugh Gas Co. v. Jackson Farm Gas Co.*, 865.)

15. CONTRACT—PUBLIC POLICY.—A contract by one gas company for supplying natural gas to another, to be sold to the latter's customers, is not against public policy nor in any respect unlawful. (*Conemaugh Gas Co. v. Jackson Farm Gas Co.*, 865.)

16. CONTRACT VOID BECAUSE FOR THE COMMISSION OF A MISDEMEANOR.—A contract between a person having carcasses of game birds or animals in his possession in the open season with a storage company to keep the same through the closed season, where such keeping is a misdemeanor, is void, and therefore damages cannot be recovered for a violation of the contract or for negligence in its performance. (*Haggerty v. St. Louis Ice etc. Co.*, 647.)

17. CONTRACTS FOUNDED ON FALSE REPRESENTATIONS.—A promise made with an intention not to perform it constitutes a fraud for which a contract may be rescinded or avoided. (*Russ Lumber etc. Co. v. Muscupiabe Land etc. Co.*, 186.)

18. CONTRACTS ARE ORDINARILY ENFORCEABLE AGAINST THE PERSONAL REPRESENTATIVES of deceased parties to the extent of assets which have come to their hands. Hence, where a trust deed authorizes the trustee, in certain contingencies, to take possession of a crop, which is subject thereto, it continues in force after the death of the grantor and as against his personal representative, and the trustee is entitled, not only to take such possession, but to retain it until indemnified for advances made by him in caring for and cultivating the crop, as well as for the amount remaining unpaid on the original indebtedness. (*Cox v. Martin*, 604.)

19. CONTRACT—CONTINUANCE AFTER THE DEATH OF THE PARTIES—TESTS OF.—Where a contract of a decedent is executory and the personal representative can fairly and fully execute it as well as the decedent himself would have done, he may do so, and enforce the contract; and, on the other hand, the personal representative is bound to complete such contract, and failing to do so, may be compelled to pay damages out of the assets in his hands. (*Cox v. Martin*, 604.)

20. UNDER A BUILDING CONTRACT providing that work is to be done or materials furnished to the entire satisfaction of the architect and also to the satisfaction of the owner, no recovery can be had if the owner is not satisfied, though the architect is, unless the dissatisfaction of the owner is shown to be capricious and unreasonable. (*Pormann v. Walsh*, 125.)

21. BUILDING CONTRACTS.—If a builder accepts payment of a contract with the understanding that no further payment shall be made unless he has made satisfactory certain plastering objected to, he cannot maintain any action unless he complies with the understanding by making such plastering satisfactory. (*Pormann v. Walsh*, 125.)

See Negligence, 1; Specific Performance.

CONVERSION.

See Trusts, 11.

CORONERS.

CORONER'S INQUEST—OBJECT OF.—The purpose of a coroner's inquest is merely to furnish the foundation for a criminal prosecution in case the death is shown to be felonious. (*Germania Life Ins. Co. v. Lewin*, 215.)

See Insurance, 66.

CORPORATIONS.

1. CORPORATIONS—FILING ARTICLES.—The mere recording of the articles of incorporation of a corporation with the certificate of the election of officers, without the intention or fact of the papers themselves remaining in the office, is not a sufficient filing to complete the organization of the corporation or vest it with corporate powers. (*Bergeron v. Hobbs*, 85.)

2. CORPORATIONS—DEFECTIVE ORGANIZATION—COLLATERAL ATTACK.—The filing of articles of incorporation required by statute is a condition precedent to the vesting of corporate powers. Until this condition is complied with, the corporation cannot act under color of legal right. It is not a corporation *de facto*, and its right to act as a corporation is subject to collateral attack. (*Bergeron v. Hobbs*, 85.)

3. CORPORATIONS—ACTS ULTRA VIRES—DEFENSES.—Although the act of a corporation in acquiring a cause of action is

ultra vires, yet want of corporate power to engage in such business cannot be interposed as a defense when the corporation seeks to enforce such cause of action. (*Farwell Co. v. Wolf*, 22.)

4. **CORPORATIONS—ACTS ULTRA VIRES.**—A corporation organized for the purpose of carrying on a general dry goods business does not possess the power to acquire by assignment claims of others for damages growing out of an alleged conspiracy to defraud, but in no way connected with its affairs, and not necessary to preserve its property or protect its interests. (*Farwell Co. v. Wolf*, 22.)

5. **CORPORATIONS—ULTRA VIRES.—ONE CORPORATION IS NOT ESTOPPED**, when sued as a stockholder in another, from urging that it had not power to become such stockholder by subscribing for, or purchasing, the stock in question, though it had undertaken to do so and had received dividends thereon. (*Chemical Nat. Bank v. Havermale*, 206.)

6. **CORPORATIONS—PURCHASE BY ONE OF STOCK IN ANOTHER.**—A national bank has no power to purchase or subscribe for stock in another corporation, though it may accept such stock as collateral security for a loan, and by the enforcement of its rights as pledgee become the owner thereof. (*Chemical Nat. Bank v. Havermale*, 206.)

7. **CORPORATIONS—EVIDENCE TO PROVE OWNERSHIP BY OF STOCK IN ANOTHER CORPORATION.**—Where a corporation has no power to acquire stock in another corporation except as the result of accepting it as a pledge for a loan, and then foreclosing the pledge, a finding that it has become the owner of such stock is not supported by evidence merely showing the reception by it of dividends thereon. Though the evidence shows that the corporation sought to acquire title to such stock and was intended to be vested with such title, this is not sufficient. It must further be proved that the stock was acquired in some mode in which the corporation was authorized to acquire it. (*Chemical Nat. Bank v. Havermale*, 206.)

8. **CORPORATIONS—LIABILITY OF ONE AS STOCKHOLDER IN ANOTHER.**—The act of a national bank in acquiring stock in another corporation is *ultra vires*, and cannot create any liability against such bank in favor of a creditor of such other corporation, nor can such liability result from the reception of dividends on such stock. A contract *ultra vires* cannot be ratified. (*Chemical Nat. Bank v. Havermale*, 206.)

9. **CORPORATIONS—DEFECTIVE ORGANIZATION—INDIVIDUAL LIABILITY.**—The filing of articles of incorporation required by statute is a condition precedent to the vesting of corporate powers. Until this condition is complied with the association is not a corporation *de facto*, although it has carried on business under supposed authority to act as a body corporate in entire good faith. In such case, the members or stockholders are individually liable for its debts and contracts. (*Bergeron v. Hobbs*, 85.)

10. **CORPORATIONS—DEFECTIVE ORGANIZATION—INDIVIDUAL LIABILITY.**—If an attempt to organize a corporation fails by omission of some substantial step or proceeding required by statute, its members or stockholders are liable as partners for its acts and contracts. (*Bergeron v. Hobbs*, 85.)

11. **CORPORATIONS—LIABILITY OF DIRECTORS.**—The liability of the directors of a bank for their negligence in permitting false and fraudulent statements as to the financial condition of the bank to be published and wrong dividends to be declared, cannot be restricted to one instance of negligence when there are more such instances in evidence. (*Houston v. Thornton*, 699.)

12. CORPORATIONS—LIABILITY OF DIRECTORS FOR FALSE STATEMENTS.—It is negligence in the directors of a bank to declare dividends wrongfully, and they are directly liable to a person injured thereby, whether they directly participate in the fraud or not. (Houston v. Thornton, 699.)

13. CORPORATIONS—LIABILITY OF DIRECTORS FOR FALSE STATEMENTS.—If false and fraudulent statements of the condition of a corporation are put forth under the authority of the directors, it is not necessary that they should know them to be such in order to hold them liable for damages sustained by anyone dealing with the corporation, relying upon the truth of such reports. (Houston v. Thornton, 699.)

14. CORPORATIONS—LIABILITY OF DIRECTORS FOR NEGLIGENCE.—It is negligence in the directors of a national bank to permit to be published false and fraudulent statements of the financial condition of the bank, whereby a person is induced to buy stock therein, for which such directors are directly liable to him, notwithstanding the appointment of a receiver upon the declared insolvency of the bank. (Houston v. Thornton, 699.)

15. CORPORATIONS—LIABILITY OF NONRESIDENT DIRECTORS FOR NEGLIGENCE.—The selection of nonresident bank directors of good character, whose names are a pledge of honest management, upon which the public makes deposits and buys stock of the bank, does not excuse such directors from liability for the negligence and mismanagement of the resident and managing directors, on the ground that, being nonresidents, they could not give proper attention to their duties, and by private arrangement it was agreed between all of the directors that they should not be required to do so. (Houston v. Thornton, 699.)

16. ACTIONS AGAINST CORPORATIONS—PLEADING—CORPORATE EXISTENCE—DEMURRER.—Failure to allege the corporate existence in an action against a corporation cannot be taken advantage of by general demurrer. (Holden v. Great Western Elevator Co., 585.)

17. FOREIGN CORPORATIONS—PLEADING IN ACTION AGAINST.—It is not necessary in an action against a foreign corporation for the complaint or summons to show that it is a foreign corporation and that certain specified persons are its agents and, as such, authorized to receive service of summons. (Georgia Home Ins. Co. v. Holmes, 611.)

18. CORPORATIONS—ACTIONS BY OR AGAINST—PLEADING CORPORATE EXISTENCE.—In an action by or against a corporation, it is unnecessary to aver its corporate existence, except in cases where the action, in its gist or substance, involves the fact of corporate existence, in which case it must be alleged the same as any other fact constituting the cause of action. (Holden v. Great Western Elevator Co., 585.)

See Actions, 4; Contracts, 3, 4; Deeds, 8; Judgment, 22.

COTENANCY.

1. COTENANCY—PURCHASE OF OUTSTANDING TITLE—EFFECT OF.—A purchase by a tenant in common of an outstanding title to the premises ordinarily inures to the benefit of his cotenant, and this applies to a mining claim. (Mills v. Hart, 241.)

2. COTENANCY—PURCHASE OF OUTSTANDING TITLE.—THE OBTAINING OF A PATENT FOR MINERAL LAND, by a cotenant, in his own name, is not the purchase of an outstanding adverse title by a cotenant, as that expression is ordinarily used, but rather the perfection of the common title, which inures to the

benefit of the cotenants of the patentee, who holds as trustee for his co-owners in the premises. (*Mills v. Hart*, 241.)

3. COTENANCY IN COAL MINES—MEASURE OF DAMAGES FOR COAL TAKEN FROM COMMON ESTATE BY ONE COTENANT.—If a cotenant in coal lands, in good faith attempts to purchase the interests of his cotenants in the common estate, and, believing that the title to such interests will be perfected in him, in good faith enters upon such estate, mines and sells coal therefrom, but fails to get the title to the land, the measure of damages against him for the coal thus taken is the value of such coal in place at the time it was mined; and if, in operating mines on his own land that nearly surround or abut on the common estate, he has constructed passageways, tracks, cars, and other fixtures, conveniently located for removing coal from the common estate, that fact, as well as any other, natural or artificial, tending to enhance or diminish the value of the coal taken as it lay in place, must be considered in fixing such value. (*Keys v. Pittsburg etc. Coal Co.*, 754.)

COUNTERCLAIM.

See Partnership, 3.

COUNTIES.

See Judgment, 30, 31.

COURTS.

See Contempt, 2.

COVENANTS.

See Assignment, 2.

CRIMINAL LAW.

CRIMINAL LAW—MISDEMEANORS.—INTENT constitutes no element of the crime of misdemeanor. Hence innocence of intention does not entitle one accused of a misdemeanor to an acquittal if he has committed acts constituting a misdemeanor. (*Haggerty v. St. Louis Ice etc. Co.*, 647.)

CROPS.

CROPS—FORECLOSURE SALE.—Crops unsevered from the land at the confirmation of a foreclosure sale become the property of the purchaser, though raised by a tenant of the mortgagor who was not a party to the foreclosure suit. It is otherwise with crops severed before the confirmation. (*Reilly v. Carter*, 621.)

CY PRES.

See Trusts, 1.

DAMAGES.

1. DAMAGES—EXCESSIVE VERDICT—RULE AS TO DISTURBING.—A verdict of a jury will not be disturbed on account of excessive damages, unless they are so outrageous as to induce the court to believe that the jury must have acted from prejudice, partiality, and corruption. (*Frankfort v. Coleman*, 412.)

2. CONSPIRACY TO DEFRAUD—MEASURE OF DAMAGES. In an action to recover damages for a conspiracy to defraud by purchasing and selling goods without paying for them, the measure of damage is the value of the goods at the place where, and the time

when, they were obtained from the plaintiff, with interest from such time, at the legal rate. (*Farwell Co. v. Wolf*, 22.)

See Assignment, 1; Contracts, 11, 19; Cotenancy, 3; Label, 1, 5-9; Release.

DEATH.

See Actions, 3; Admiralty, 4; Negligence, 4-7.

DEDICATION.

1. **STREETS.—THE DEDICATION OF LAND AS A PUBLIC STREET** is not established by proof that for a period of eight years, without either assent or objection on the part of the owner, it was used by the public generally for travel. (*San Francisco v. Grote*, 155.)

2. **STREETS—NEW USES OF.**—The dedication and appropriation of lands for a public street is not restricted to the purposes for which streets have hitherto been used, but the uses may be enlarged to answer all the additional and improved methods of attaining the same objects and enjoying the same privileges, not, however, to the substantial impairment of the owner's use and enjoyment of his abutting property. (*Magee v. Overshiner*, 858.)

3. **DEDICATION TO PUBLIC USE—PRIVATE CITIZEN, WHEN MAY SUSTAIN SUIT TO PREVENT A CHANGE OF THE USE.**—If municipal authorities are about to put property dedicated for use as an ornamental park to a different use, donors of such property, or any lot owner, and perhaps any private citizen, may maintain a suit to enjoin the proposed use. (*Rowzee v. Pierce*, 625.)

DEEDS.

1. **DEEDS.—DELIVERY** of a deed executed in behalf of an infant for the consideration of love and affection, to a witness of the deed for the benefit of such infant, is a delivery to the infant. (*Parker v. Salmons*, 291.)

2. **DEEDS—DELIVERY—EVIDENCE OF.**—A deed duly recorded is admissible in evidence without further proof, not only to show that it was signed, but that it was also delivered. (*Parker v. Salmons*, 291.)

3. **DEEDS—DELIVERY—EVIDENCE OF.**—Delivery to, and possession by, a father of a deed conveying to his infant child a tract of land, tend to prove delivery of the deed to such infant, although it does not purport on its face to have been delivered. (*Parker v. Salmons*, 291.)

4. **DEEDS—DESCRIPTION — EVIDENCE.**—Although the description of land contained in a deed thereof is inaccurate in some details, yet if, when aided by competent extrinsic evidence and taken in connection with other deeds conveying other parcels of the same tract, the property intended to be conveyed can be sufficiently identified, it cannot be said, as matter of law, that the deed is so wanting, vague, and uncertain in description as to be void and inadmissible as evidence of title. (*Parker v. Salmons*, 291.)

5. **CONVEYANCE — WHEN DOES NOT INCLUDE THE WHOLE INTEREST OF THE GRANTOR.**—A conveyance of an estate for life of the party of the first part in and to the undivided one-third part belonging to the party of the second part of all the real estate of which J. O. died seised in his demesne and of fee, does not include the life estate of the grantor in the property which she did not acquire from J. O. (*Deshong v. Deshong*, 855.)

6. **DEEDS—DIFFERENCE BETWEEN GIFT AND PURCHASE.**—A deed of gift from an ancestor is supported alone by a

consideration, of blood or marriage, but a deed for a consideration other than blood, that is, a valuable consideration, is a purchase. (Brown v. Whaley, 793.)

7. **DEEDS—WHETHER OF GIFT OR PURCHASE.**—A deed of real estate from a father and mother to their daughter, "in consideration of our love and affection for our daughter, . . . and in consideration of the faithful obedience and faithful services to us of our said daughter, . . . and in further consideration of one dollar to us in hand paid by our said daughter," is not a deed of gift, but a purchase, and the title acquired under such deed is by purchase. (Brown v. Whaley, 793.)

8. **DEEDS OF CORPORATION—DEFECTIVE ACKNOWLEDGMENT.**—An acknowledgment of the deed of a corporation made by individuals instead of by its officers is fatally defective and its registration is void. A subsequent reacknowledgment and reregistration of the deed, after the accrual of another title and after action brought to maintain such title, can have no effect. (Bernhardt v. Brown, 725.)

9. **EVIDENCE TO SHOW THAT A DEED WAS INTENDED AS A MORTGAGE.**—Where a deed purports to be absolute, a trial court is justified in requiring clear proof that it was intended as a mortgage. (Falk v. Wittram, 184.)

See Trusts, 10.

DEFINITIONS.

"Aged or infirm person." (Allen v. Pearce, 306.)

Criminal contempt. (State v. Circuit Court, 90.)

Insurance. (Dover Glass etc. Co. v. American Fire Ins. Co., 264.)

"Malicious abuse of process." (Docter v. Reldel, 40.)

"Mayhem and maim." (State v. Johnson, 769.)

"Original package." (McGregor v. Cone, 522.)

Succession tax. (State v. Switzler, 653.)

Warehouseman. (Tradesmen's Nat. Bank v. Kent Mfg. Co., 876.)

DEPOSITIONS.

See Appeal, 8.

DESCENT.

See Adoption, 2, 8.

DEVISE.

DEVISE—TRUST—EFFECT OF RELINQUISHMENT OF DEVISE AND FAILURE OF TRUST.—If an absolute devisee relinquishes all claims under the will, except such as may come from a trust thereunder, the devise must fail if no trust is shown, and the property becomes a part of the residuary estate, to be disposed of as if no devise of it had been attempted. (Moran v. Moran, 448.)

See Charities, 7-9; Estates.

DUE PROCESS OF LAW.

See Contempt, 8.

DURESS.

DURESS OF GOODS.—A lessee who, in compliance with the terms of his lease, has taken out insurance policies, covering the lessor's interests in the property, as well as his own, and who is in a position where he must obtain insurance money at once to enable him to go on with his business and fulfill outstanding contracts or

suffer great loss, and who pays to the lessor under protest a sum which he does not owe, to induce such lessor to join in executing proofs of loss and in indorsing drafts without which the lessee cannot obtain his insurance money, the policy being payable to both of the parties as their interests shall appear, may recover the amount so paid on the ground that it was paid under duress. (*Guetskow Bros. Co. v. Breese*, 83.)

EASEMENT.

See *Waters*, 2.

EJECTMENT.

1. EJECTMENT MAY BE MAINTAINED BY A MUNICIPAL CORPORATION to recover possession of a street dedicated to a public use, whether it or the adjacent proprietor owns the fee. (*San Francisco v. Grote*, 155.)

2. EJECTMENT.—RENTS AND PROFITS for a period prior to the commencement of an action of ejectment can be recovered only when it is shown that the defendant had knowledge of the plaintiff's claim. (*Clarkson v. Hatton*, 635.)

3. EJECTMENT—BURDEN OF PROOF.—If the land in dispute in ejectment is within the boundary of plaintiff's deed, and the defendant claims under exceptions to such deed, the burden of proof is upon him to bring himself within such exceptions. (*Bernhardt v. Brown*, 725.)

4. EJECTMENT.—EVIDENCE OF ADVERSE POSSESSION for a period less than prescribed time is not a circumstance to go to the jury as tending to show title in an action of ejectment. (*Bernhardt v. Brown*, 725.)

5. EJECTMENT—PAYMENT OF TAXES AS EVIDENCE OF TITLE.—In an action of ejectment, mere evidence of the payment of taxes is not proof of title in the payor, when he has not connected himself with any outstanding title, or shown adverse possession for the time required. (*Bernhardt v. Brown*, 725.)

EMINENT DOMAIN.

1. EMINENT DOMAIN.—THE RIGHT TO TAKE LANDS ALREADY APPROPRIATED TO ONE PUBLIC USE for the purpose of appropriating them to another exists only when there is a statute clearly conferring such authority. A statute authorizing the laying out of a public highway does not justify taking therefor lands previously devoted to some other public use. (*Little Nestucca Road Co. v. Tillamook Co.*, 802.)

2. EMINENT DOMAIN.—THE TAKING OF LAND ALREADY DEVOTED TO ONE PUBLIC USE and appropriating it to another may be authorized by the legislature, but the authority must be conferred by express terms or arise from necessary implication. (*Little Nestucca Road Co. v. Tillamook Co.*, 802.)

3. EMINENT DOMAIN.—PROPERTY ALREADY DEVOTED TO ONE PUBLIC USE cannot be taken for another without first making compensation to the persons interested in the previous public use. Hence, lands used as a public toll road cannot be taken for public highways free from such tolls, unless the owners of the toll road are compensated for moneys expended by them in acquiring the right of way and in making improvements. (*Little Nestucca Road Co. v. Tillamook Co.*, 802.)

4. PLEADING — ANTICIPATING DEFENSES.—Ordinarily, a plaintiff need not in his complaint anticipate or negative a possible

defense. Hence, where plaintiff seeks to enjoin the taking of his property for a public use he need not aver that he has not received compensation for such taking. (*Little Nestucca Road Co. v. Tillamook Co.*, 802.)

EQUITABLE CONVERSION.

See Wills, 5.

EQUITY.

1. **EQUITY JURISDICTION MAY BE SUSTAINED** upon the ground that it affords the most convenient remedy. (*Conemaugh Gas Co. v. Jackson Farm Gas Co.*, 865.)

2. **PRACTICE—EQUITABLE DEFENSES.**—The mere suggestion of an accounting or of an equitable defense is not sufficient to oust a court of law of jurisdiction. The defendant must go farther, and state some specific ground for invoking the jurisdiction of equity. (*Willis v. Barron*, 672.)

3. **EQUITY.—PARTIES IN PARI DELICTO** are not entitled to relief in equity. The court must refuse to aid either, and must leave them where by their illegal acts they have placed themselves. (*Markley v. Mineral City*, 776.)

4. **EQUITY—MISTAKE—REFORMATION OF CONTRACT—WHEN NOT JUSTIFIED.**—A mistake as to the construction or legal effect of a written agreement between two parties does not justify its reformation unless the mistake is mutual. A mistake by one of the parties, unaccompanied by any fraud of the other is not enough. (*Williams v. Hamilton*, 475.)

5. **EQUITY—MISTAKE AND FRAUD—REFORMATION OF CONTRACT—WHEN JUSTIFIED.**—If one of two parties to a contract is illiterate and relies upon the other, to the latter's knowledge, to embody their oral agreement in a written contract, the former may have the contract reformed so as to conform to their understanding, where it was read over to him before it was executed, and he called attention to a certain omission, but was assured by the other party that the contract covered everything agreed upon, which was not true. (*Williams v. Hamilton*, 475.)

6. **EQUITY—MISTAKE AND FRAUD—REFORMATION OF CONTRACT—WHEN JUSTIFIED.**—A mistake of law by one of two parties to a written agreement, if accompanied by fraud of the other party, may, under certain circumstances, authorize a reformation of the contract. (*Williams v. Hamilton*, 475.)

7. **EQUITY—REFORMATION OF CONTRACT—RATIFICATION.**—A party to a written agreement cannot ratify it, after its execution, without knowing and understanding its contents. Hence, he is not precluded from obtaining a reformation thereof, on the ground that he ratifies it after its execution, where there is no showing of any such knowledge. (*Williams v. Hamilton*, 475.)

See Judgment, 22-25; Municipal Corporations, 4; Specific Performance; Trusts, 8.

ESTATES.

DEVISE TO A PERSON NAMED, AND HIS "HEIRS." CREATES ONLY A LIFE ESTATE, WHEN—INTENTION OF TESTATOR.—If land is devised to one "to hold the same during the term of his natural life," and to have the use, rents, and profits of it during such time, but with a provision that he shall have no power to convey or dispose of the same for a period longer than his life, and that, at his death, it shall descend to his heirs, the clear intention of the testator is to create a life estate only, and the

fact that he is presumed to have intended a devise of all his interest in the property, and that the heirs of the devisee cannot be definitely known until his death, does not create in him a larger estate than the testator intended him to have. (*Westcott v. Binford*, 530.)

See Appeal, 9; Partition, 2.

ESTOPPEL.

ESTOPPEL TO ASSERT SUPERIOR TITLE.—If parties claim title from a common source, and the assertion of such title by the defendant is adjudged invalid, he is estopped, in a subsequent action involving the title to the same land, to assert a superior title in some one else with whom he does not connect himself. (*Bernhardt v. Brown*, 725.)

See Building and Loan Associations, 1, 2; Corporations, 5; Husband and Wife, 7; Insurance, 26, 56-58; Municipal Corporations, 25.

EVIDENCE.

1. EVIDENCE—JUDICIAL NOTICE—POWER OF NOTARY IN ANOTHER STATE TO ADMINISTER OATHS.—Whether a notary public in another state has power to take affidavits is a matter of which the courts of this state cannot take judicial notice. (*Teutonia Loan etc. Co. v. Turrell*, 419.)

2. EVIDENCE—JUDICIAL NOTICE AS TO PLEADINGS WITHDRAWN.—A court will take judicial notice that pleadings withdrawn were held insufficient on demurrer, as the matter is one of record. (*Hoyt v. Beach*, 461.)

3. STATUTES OF OTHER STATES—JUDICIAL NOTICE.—The respective states of the United States are foreign to each other so far as taking judicial notice of what the statutory laws of those states are is concerned. (*Meyers v. Chicago etc. Ry. Co.*, 579.)

4. STATUTES OF OTHER STATES—PROOF OF.—The statute law of another state is a fact that must be proved like any other fact, and, in the absence of such proof, the court must presume that the common law is in force in such other state. (*Meyers v. Chicago etc. Ry. Co.*, 579.)

5. STATUTES OF OTHER STATES—PLEADING AND PROOF OF.—Foreign statutory laws are usually regarded as matters of fact, and are required to be pleaded as well as proved if they constitute the foundation of the claim of defense. (*Meyers v. Chicago etc. Ry. Co.*, 579.)

6. ACTIONS—TORTS—PRESUMPTION AS TO STATUTE.—If a wrong is one for which the right of action is purely statutory, no presumption arises that such statute is in force outside of the state which enacted it. (*Meyers v. Chicago etc. Ry. Co.*, 579.)

7. EVIDENCE—PRESUMPTION FROM SUPPRESSION OR ATTEMPT TO CORRUPT.—Though the defendant has not testified, evidence may be received showing that at a former trial of the same cause he attempted to procure a witness to testify falsely, and also sought to have a third person corrupt the jurors. This is but an application of the rule that a spoliation of papers and a destruction or withholding of evidence which a party ought to produce gives rise to a presumption unfavorable to him, as his conduct may properly be attributed to his supposed knowledge that the truth would operate against him. (*McHugh v. McHugh*, 849.)

8. EVIDENCE OF THE EFFECT upon one of plaintiff's eyes of an injury inflicted directly upon the other is admissible. (*Maitland v. Gilbert Paper Co.*, 137.)

9. EVIDENCE—PROOF OF CONTENTS OF WRITING BY PAROL.—If the fact that a witness has knowledge of the existence of an insurance policy is relevant as affecting her credibility, it may be inquired into, and she may be allowed to state the amount of such policy if she knows it, as a substantive fact independent of the policy. (*Kearney v. State*, 344.)

10. EVIDENCE—CONFESSIONS.—A LETTER GIVEN BY A PRISONER to the sheriff, to be delivered to a third person, but retained by the sheriff, is admissible in evidence against the writer, if it contains statements amounting to admissions of his guilt. (*Commonwealth v. Goodwin*, 852.)

11. EVIDENCE—ARTIFICE IN OBTAINING CONFESSIONS DOES NOT RENDER THEM INADMISSIBLE.—Hence if a person accused of murder requests an interview with a girl charged with complicity with him, and, on such interview being granted, two deputy sheriffs are concealed so as to hear what was said, their testimony and that of the girl is admissible. (*Commonwealth v. Goodwin*, 852.)

See Contracts, 1, 2, 5; Corporations, 7; Deeds, 4, 9; Fraudulent Conveyances, 2; Homestead, 4; Homicide, 1-6, 9; Insurance, 61, 62, 65-67; Marriage and Divorce, 2; Trusts, 8, 9.

EXECUTIONS.

1. EXECUTIONS.—AN EXCESSIVE SEIZURE under execution of a defendant's property is a fraud upon his rights and void; and a sale by parcels does not cure it, when it appears that the seizure of anyone of the parcels would have been in itself an excessive levy. (*Williamson v. White*, 302.)

2. EXECUTIONS—DIRECTORY STATUTE.—A statutory requirement that the date of the docketing of judgment shall be stated in the execution issued thereon, is directory merely. (*Bernhardt v. Brown*, 725.)

3. EXECUTION SALES—DOCKETING JUDGMENT.—Sale under an execution levied on realty carries a good title, though the judgment under which the execution issues is not docketed, or the lien of the docketing has expired. (*Bernhardt v. Brown*, 725.)

4. EXECUTIONS—COLLATERAL ATTACK.—Proceedings under a voidable execution cannot be collaterally attacked. (*Bernhardt v. Brown*, 725.)

5. EXECUTIONS.—CLERICAL ERRORS contained in an execution which do not invalidate any other part of it cannot be complained of by strangers to it. (*Bernhardt v. Brown*, 725.)

6. EXECUTION SALES AND SHERIFF'S DEED—REFORMATION OF.—If one parcel of land is intended to be conveyed to a judgment debtor, but another is actually conveyed to him, and he takes and holds possession of that intended to be conveyed, a levy and sale under execution describing the property according to the conveyance is void, and cannot be perfected, assisted, or reformed in equity. (*Burrows v. Parker*, 812.)

7. EXECUTION SALES—APPLICATION OF PURCHASER TO BE PUT IN POSSESSION—PARTIES BOUND BY PROCEEDING. If, when a purchaser of real estate at execution sale applies to the court for an order requiring the sheriff to put him in possession thereof, one who claims to be the owner of the property appears at the hearing and presents written objections to the granting of such order, he is not, unless actually made a party to such proceeding, bound by any judgment rendered therein. (*Williamson v. White*, 302.)

8. **EXECUTION SALES—DEFICIENCY ON RESALE—RIGHT OF SHERIFF TO RECOVER.**—If a sheriff legally sells personalty under execution, and, upon the refusal of the purchaser to comply with the terms of sale, the property is resold at his risk and brings a lower price, the sheriff may recover from him, in addition to the deficiency, any absolutely necessary and proper expense attendant upon the keeping and storing of the property pending its readvertisement and sale. (*Barnes v. Bluthenthal*, 339.)

9. **EXEMPTION OF WAGES** from execution does not prevent their being sold for the payment of poll taxes. (*White v. Martin*, 616.)

10. **EXEMPTIONS—HEAD OF A FAMILY.**—One who has living with him an ablebodied adult son, capable of maintaining and supporting himself, is not, on that account, entitled to exemption as the head of a family. (*Cox v. Martin*, 604.)

11. **EXEMPTIONS—PURCHASE MONEY LIEN—RIGHT OF ASSIGNEE.**—Under a statute providing that property mentioned is not exempt from attachment issued in an action for the purchase price thereof, or from execution issued upon any judgment rendered therein, an assignment of a note given for the purchase price of such property operates as an assignment of the right to collect it, and the assignee has the same right to sue and levy on the property that the vendor had. (*Langevin v. Bloom*, 546.)

12. **EXECUTIONS—EXEMPTIONS—"AGED PERSON."**—A man sixty-six years of age, though "hale and hearty," is entitled to an exemption of his property from levy and sale under execution, under a constitutional provision allowing this right to "every aged or infirm person." (*Allen v. Pearce*, 306.)

See Taxes, 12.

EXECUTORS AND ADMINISTRATORS.

EXECUTOR OR ADMINISTRATOR—MISCONDUCT OF, DURING A TRIAL.—Though the defendant is an administrator or executor, his misconduct at a trial in attempting to suborn witnesses or to corrupt jurors may be proved in evidence against him. (*McHugh v. McHugh*, 849.)

See Contracts, 18, 19; Liens, 1.

EXEMPTIONS.

See Executions; Homestead.

EXTRADITION.

1. **EXTRADITION—REVOCATION OF WARRANT.**—The governor of a state may effectively revoke his extradition warrant for the surrender of an alleged fugitive from justice at any time before he is taken out of the state. (*State v. Toole*, 553.)

2. **EXTRADITION—REVOCATION OF WARRANT—CONCLUSIVENESS.**—If the governor of a state has revoked his warrant for the surrender of an alleged fugitive from justice, no inquiry can be made in a proceeding on habeas corpus on behalf of such fugitive as to the ground of such revocation, and the prisoner must, therefore, be discharged. (*State v. Toole*, 553.)

FOREIGN INSURANCE COMPANIES.

See Attachment, 8, 9.

FORGERY.

See Banks and Banking, 8.

FRAUD.

See Contracts, 17; Judgment, 18; Release, 2

FRAUDULENT CONVEYANCES.

1. FRAUDULENT CONVEYANCES.—A DEED ABSOLUTE ON ITS FACE, but intended as mere security for a debt, is fraudulent and void as against the creditors of the grantor. (Bernhardt v. Brown, 725.)

2. FRAUDULENT CONVEYANCES—EVIDENCE.—If a deed absolute on its face is claimed to be fraudulent as being intended merely as security for a debt of the grantor, an unrecorded deed of defeasance to the land and bonds secured thereby are competent as evidence tending to show the nature of the transaction, without proof of their execution. (Bernhardt v. Brown, 725.)

See Husband and Wife, 3-6

FREE SCHOLARSHIP.

See Taxes, 5.

GAME LAWS.

GAME LAWS—KEEPING GAME KILLED IN THE OPEN SEASON AFTER THE END THEREOF.—A statute making it a misdemeanor for any person to have in his possession any game birds or animals, or any flesh, pieces or parts thereof, during the season when the catching or killing thereof is prohibited, applies to such birds or animals, or any part thereof, though killed within the open season. (Haggerty v. St. Louis Ice etc. Co., 647.)

See Contracts, 16.

GARNISHMENT.

See Attachment.

GIFTS.

See Charities, 9; Deeds, 6, 7.

GUARDIAN AND WARD.

1. A GUARDIAN LOANING THE MONEYS OF HIS WARDS, and taking notes and mortgages therefor in his own name, thereby unnecessarily and willfully mingles the trust property with his own, and becomes liable for its safety in all events, and is not, in his accounts, entitled to be credited with the amounts so loaned. (Matter of Bane, 197.)

2. GUARDIAN AND WARD—BOND WHERE THERE IS NO ORDER OF APPOINTMENT.—A bond given by a person as the guardian of a minor, by which he obtains possession of the property of his supposed ward, is valid and enforceable, though it appears that no formal order was ever made appointing him such guardian. (Hazelton v. Douglas, 122.)

See Subrogation.

HABEAS CORPUS.

See Extradition, 2.

HEAD OF FAMILY.

See Executions, 10.

HEIRS.

ESTATES OF DECEDENTS.—WHERE AN ACTION IS BROUGHT BY HEIRS to recover a debt due their ancestor, they must allege and prove that the debts of the ancestor have been paid, or the estate settled, or that no letters of administration have been granted. (*Magel v. Milligan*, 382.)

See Adoption, 2, 3.

HIGHWAYS.

1. HIGHWAYS—PLACE OF INJURY—STREET.—One injured in a street is injured in a public highway. (*Frankfort v. Coleman*, 412.)

2. STREETS—ADDITIONAL SERVITUDE IN.—The use of a public street for a telephone line is a servitude within the contemplated uses of such street. Hence it does not impose an additional burden for which an owner of abutting property is entitled to be compensated. (*Magee v. Overshiner*, 358.)

3. STREETS.—A TOWN PLAT IS NOT CONCLUSIVE that there is a strip of land, as there represented, between a street, and the shore of a lake. The dimensions of the several lots as they appear on the plat must yield to the actual condition of things as they exist, and be determined by the practical location and construction of the plat upon the ground. (*Madison v. Mayers*, 127.)

4. STREETS—ACTUAL LOCATION OF, CONTROLS.—In the absence of original monuments which can be ascertained, the location and occupancy of a street as indicated by old buildings and fences, and by its use for many years, must control as a practical location of the street, and is a practical construction of the plat thereof. The lands included in the street as thus used must be regarded as dedicated to the public use. (*Madison v. Mayers*, 127.)

5. HIGHWAY—CREATION OF, BY USER.—If a highway has been used by the public for more than twenty years, it becomes a lawfully existing highway, and the right of the public to use it becomes fixed. (*Frankfort v. Coleman*, 412.)

6. STREETS.—MERE NONUSER of a part of a street cannot operate as a surrender or abandonment of any part of it for the purpose of a public street. (*Madison v. Mayers*, 127.)

See Eminent Domain, 3.

HOLDER FOR VALUE.

See Negotiable Instruments, 2.

HOMESTEAD.

1. HOMESTEAD EXEMPTION.—The rule of marshalling securities does not apply to homestead exemptions. A mortgagee of real property, part of which is a homestead, will not be permitted nor required to resort to the homestead alone for the satisfaction of his lien. (*Koen v. Brill*, 633.)

2. HOMESTEADS—LEASE OF BY HEAD OF FAMILY, WHEN VOID.—After a homestead has been set apart out of the lands of a husband for the benefit of his wife and minor children, a lease executed by him alone, during the continuance of the homestead, purporting to convey to third parties all rights to the timber on such land for turpentine and other purposes, and also all his right, title and interest in the sawmill timber thereon, to be cut by the lessees or their assigns, within a certain period, is void. (*Pritchett v. Davis*, 298.)

3. **HOMESTEAD.**—The dedication as a public street of lands which are subject to a homestead cannot, as against a wife, result from the acts or agreement of her husband. (*San Francisco v. Grote*, 155.)

4. **HOMESTEADS—EVIDENCE.**—The original homestead papers are primary evidence of the setting apart and valuation of the homestead. The record of such papers is only secondary evidence. (*Pritchett v. Davis*, 298.)

5. **HOMESTEAD.—AN INJUNCTION WILL ISSUE** against the sale of a homestead under execution where it is so encumbered that no benefit can accrue therefrom to the creditor. (*Koen v. Brill*, 633.)

6. **HOMESTEADS — INJUNCTION. — BENEFICIARIES** in a homestead have such an interest in the use and enjoyment of the property as enables them directly to maintain a suit for an injunction to protect it against an illegal invasion. (*Pritchett v. Davis*, 298.)

HOMICIDE

1. **HOMICIDE—JUSTIFICATION.**—A homicide committed in self-defense, or in defense of habitation, property, or person, against one who manifestly intends or endeavors, by violence or surprise, to commit a felony on either, is justifiable homicide. (*Powell v. State*, 277.)

2. **HOMICIDE—PROOF OF CHARACTER.**—Except when special facts may have been shown to have existed in a particular case, evidence of character, conduct, or utterances of the deceased is not admissible in trials for homicide. (*Powell v. State*, 277.)

3. **HOMICIDE—PROOF OF CHARACTER.**—In a trial for homicide, where the plea of self-defense is set up, evidence of the character of the deceased for violence must be confined to evidence of his general character and reputation, and this cannot be established by proof of specific acts. (*Powell v. State*, 277.)

4. **HOMICIDE—EVIDENCE OF CHARACTER.**—If, on a trial for homicide, the character of the deceased for peace or violence is in issue, the testimony of a witness to the general character of the deceased cannot be confined to evidence of what is generally said in reference thereto. It is competent to show by a witness who has lived in the same community with the deceased, that he knows the estimation in which he was held by the people, and that he has never heard the character of such person questioned. Such evidence authorizes the inference that such character was good. (*Powell v. State*, 277.)

5. **HOMICIDE—DECLARATIONS OF ACCUSED AS EVIDENCE.**—On a trial for murder, where self-defense is set up, declarations of present pain made by the accused soon after the killing, and alleged by him to have been caused by an attack made by the deceased at the time of the killing, are admissible in evidence to be considered by the jury along with the other facts in the case. (*Powell v. State*, 277.)

6. **MURDER—DECLARATIONS AS EVIDENCE—INSTRUCTIONS.**—A declaration made by one charged with murder admitting the homicide, but disavowing any criminal responsibility therefor, though admissible in evidence as an admission of a fact, is not a confession of guilt, and does not authorize instructions on the law of confessions. (*Powell v. State*, 277.)

7. **CRIMINAL LAW—INSTRUCTIONS.**—If, on a murder trial, the court undertakes to instruct the jury as to the various forms in which their verdict may be written, and in so doing states what would be proper forms for all findings, from that of murder without recommendation down to involuntary manslaughter in the com-

mission of a lawful act, he should not fail to state what the form of verdict should be in case of acquittal, but failure to do so is not ground for a new trial, when it appears that the court distinctly charged the jury that, in a certain view of the evidence, they should acquit the accused, and when it is manifest, from finding him guilty of the highest offense charged, that the omission in question could have done him no injury. (*Kearney v. State*, 344.)

8. **HOMICIDE—INSTRUCTIONS.**—If, on a trial for murder, the accused pleads self-defense, and the court, after instructing the jury as to all grades of homicide, in conclusion instructs the jury to "look to all the facts and circumstances surrounding and connected with the case; if you find that the defendant and deceased had a difficulty, look to all the facts and circumstances surrounding and connected with it; see whether or not it was necessary for the defendant to take the life of the deceased in order to save his own life. Before he would be justified and you would be authorized to find him guilty of no offense, you must believe from the evidence that it was necessary for him to take the life of the deceased in order to save his own life," such instruction is erroneous in that it excludes from the consideration of the jury the question whether the accused killed the deceased to prevent a felony being committed on his person. (*Powell v. State*, 277.)

9. **EVIDENCE—DYING DECLARATIONS.**—The declaration of a person after he was shot that, in his opinion, the shooting was accidental, is not admissible in evidence as a dying declaration in favor of the party accused of his murder by such shooting. (*Kearney v. State*, 344.)

See Trial, 2.

HUSBAND AND WIFE.

1. **HUSBAND AND WIFE HOLDING BY THE ENTIRETIES—MORTGAGES GIVEN BY.**—There is a presumption, where lands are held by the entireties, and the joint note and mortgage of the husband and wife are given to secure a loan, that they are principals and equally responsible, and satisfactory evidence should be given in favor of the wife where she claims to be a surety only. (*Magel v. Milligan*, 382.)

2. **HUSBAND AND WIFE—TENANTS BY ENTIRETIES—ACTION FOR DAMAGES—PARTIES PLAINTIFF.**—If a husband, engaged in business, is in possession of a storeroom and stock of general merchandise, which are injured by an explosion of natural gas, he may recover damages therefor without joining his wife in the action, whether the title to the real estate is in himself, or in himself and his wife, as tenants by entireties. (*Sheridan Gas etc. Co. v. Pearson*, 402.)

3. **MARRIED WOMAN—CONVEYANCE ON THE EVE OF MARRIAGE TO DEFEAT RIGHTS OF.**—A secret voluntary conveyance, made by a man on the eve of his marriage, operates as a fraud upon his wife, and will not be permitted to defeat her of her dower or other interest in the lands conveyed thereby, where he has represented to her that he is the owner of such lands as an inducement to the marriage. (*Bookout v. Bookout*, 350.)

4. **FRAUDULENT CONVEYANCES—HUSBAND'S FRAUD UPON RIGHTS OF HIS WIFE.**—If a married man conveys his property to his children, but retains control of the property and withholds the deeds from record for the period of four years after their execution, and his wife has no knowledge thereof until after the grantor's death, the fact that all the deeds were thus withheld leads very strongly to the conclusion that it was done as the result of an understanding between the grantor and grantees, and that the

grantees were guilty of collusion in the matter for the purpose of preventing information of the transfer from reaching the wife of the grantor, and to permit him, in the mean time, to continue to exercise exclusive dominion and control over the property. (Smith v. Smith, 251.)

5. FRAUDULENT CONVEYANCES—HUSBAND'S POWER TO DISPOSE OF HIS PROPERTY—FRAUD UPON RIGHTS OF WIFE.—If a husband makes a mere colorable disposition of his property, for the purpose of defeating the rights of his wife as his heir, and manifests an intention of reserving to himself the exclusive dominion and control of the property, and the reservation to himself of the right to use and enjoy it during his lifetime, the transaction is a fraud on the rights of the wife and will be set aside. (Smith v. Smith, 251.)

6. FRAUDULENT CONVEYANCES—HUSBAND'S POWER TO DISPOSE OF HIS PROPERTY—FRAUD UPON RIGHTS OF WIFE.—A husband has power to dispose absolutely of his property during his life, independently of the concurrence, and exonerated from the claim, of his wife, if the transaction is not merely colorable, and is not attended with circumstances indicative of fraud upon the rights of the wife. If the disposition of the husband is bona fide, and no right is reserved to him, though made to defeat the right of the wife, it will be good against her. (Smith v. Smith, 251.)

7. MARRIED WOMAN—ESTOPPEL TO DENY PURPOSE FOR WHICH MONEY WAS LOANED.—Where, for the purpose of inducing a loan, to be secured by a mortgage on land held by a husband and wife by the entirety, they make an affidavit to the effect that the moneys to be borrowed are to be used in part to pay off an encumbrance on such land, and the balance to purchase other lands, to be held by them in the same manner, she is estopped, in an action to foreclose the mortgage, from insisting that the moneys were borrowed for the use of her husband, and that no part thereof had been received by her or used in the improvement of her separate estate, where the lender of the money relied upon her affidavit and had no notice that any of the statements thereof was untrue. (Magel v. Milligan, 382.)

8. A JUDGMENT AGAINST A MARRIED WOMAN cannot be stricken off for defect not appearing on the record. (Stahr v. Brewer, 883.)

9. A MARRIED WOMAN SEEKING TO AVOID A JUDGMENT by confession must show not only the fact of her marriage, but also all other circumstances necessary to relieve her from liability. (Stahr v. Brewer, 883.)

10. JUDGMENT—MARRIED WOMAN'S LIABILITY UPON.—Where a married woman seeks to be relieved from a judgment against her upon a judgment note signed by her, upon the ground that she was not liable thereon, and there is evidence tending to prove that her husband conducted business in her name without any knowledge on her part of the details, and that she gave her name willingly to all his transactions whenever requested by him, and that the note in question was made to secure a debt due to the plaintiff, the question of her liability should be submitted to the jury, and the court is not justified in determining that she is not answerable. (Stahr v. Brewer, 883.)

11. CRIMINAL LAW—FAILURE TO SUPPORT WIFE—FINANCIAL MEANS OF WIFE.—The fact that a wife has financial means does not relieve her husband from his statutory duty of supporting her, especially where no claim is made that such means were obtained from him. Hence, evidence that she had such means

prior to the commencement of a prosecution under such a statute is wholly immaterial. (People v. People, 245.)

See Appeal, 15, 21; Bonds; Homestead, 2, 3; Information, 3, 4; Judgment, 21; Witnesses, 1.

INDICTMENT.

See Mayhem, 2-4.

INFANTS.

See Deeds, 1.

INFORMATION.

1. INFORMATION.—IN CHARGING AN OFFENSE, it is sufficient to allege the facts constituting it, and is not necessary to aver facts to show affirmatively that the person charged is one who can be prosecuted for such offense. (Poole v. People, 245.)

2. INFORMATION—FORM—AMBIGUITY.—Although an information may be successfully attacked, at the proper time, by a motion on account of form, or ambiguity, it is too late to raise that question after trial. (Poole v. People, 245.)

3. INFORMATION—FAILURE TO SUPPORT WIFE—CHARGING THE OFFENSE—TIME.—An information was filed with a justice of the peace, on January 18, 1897, charging a party with failure to support his wife, and carelessly alleged the time of the offense as "on or about the nineteenth day of September, and continuously since, A. D. 1897"; but from the language employed, charging the time when the offense was committed, it was held to be fairly inferable that it was at a date prior to the time when the information was filed with the justice. (Poole v. People, 245.)

4. INFORMATION—FAILURE TO SUPPORT WIFE—CHARGING THE OFFENSE.—The statutory offense of the failure of a husband to support his wife consists of the husband's willful neglect to provide reasonable support and maintenance for his wife, and it is not necessary to allege in the information that the defendant is a resident of the state, where nonresidents are excepted from the operation of the statute. It is not necessary to negative exceptions, and if the defendant is a nonresident, that is a matter of defense. (Poole v. People, 245.)

INJUNCTIONS.

See Dedication, 3; Eminent Domain, 4; Homestead, 5, 6.

INSANE PERSONS.

See Judgment, 21; Witnesses, 1.

INSOLVENCY.

See Banks and Banking, 10.

INSTRUCTIONS.

1. INSTRUCTIONS—BY COLLATING FACTS.—It is proper for the court to collate the facts and to state the rule of law applicable. (Medearis v. Anchor Mut. Life Ins. Co., 428.)

2. INSTRUCTIONS—WHEN FAILURE TO GIVE, IS NOT REVERSIBLE ERROR.—If there is no reversible error in the instructions given, there can be no reversal for a failure to give additional instructions not requested. (Tracy v. Hackett, 398.)

See Homicide, 6-8.

INSURANCE.

1. **INSURANCE—DEFINITION.**—An insurance in relation to property is a contract whereby the insurer becomes bound, for a definite consideration, to indemnify the insured against loss or damage to certain property named in the policy by reason of certain perils to which it may be exposed. (*Dover Glass etc. Co. v. American Fire Ins. Co.*, 264.)

2. **INSURANCE—RIGHTS OF PARTIES, HOW FIXED.**—A policy of insurance, and the conditions therein, fix the relations between the parties thereto and furnish the measure of their respective rights and liabilities. Courts cannot go outside of such agreement of the parties to determine their mutual or reciprocal obligations. (*Dover Glass etc. Co. v. American Fire Ins. Co.*, 264.)

3. **INSURANCE—CONSTRUCTION OF CONTRACT.**—The statute of North Carolina provides that "all contracts of insurance, the application for which is taken within the state, shall be deemed to have been made within the state, and subject to the laws thereof." Hence a policy of insurance issued by a foreign company upon an application made in that state is governed by such statute, no matter what the form of the contract may be. (*Horton v. Home Ins. Co.*, 717.)

4. **INSURANCE—CONDITIONS.**—It is competent for an insurer to prescribe the terms and conditions upon which he will take a proposed risk, provided they are not illegal nor contrary to public policy, and the acceptance of such conditions imposes upon the insured the duty of a substantial compliance therewith, and any neglect thereof in any material respect, unless waived or condoned, relieves the insurer from liability in case of loss, whether it can be traced to such neglect or not. (*Dover Glass etc. Co. v. American Fire Ins. Co.*, 264.)

5. **INSURANCE—CONDITIONS OR CLAUSES** inserted in a contract of insurance which induce caution as to the conduct of either party in respect to the subject matter thereof, are not repugnant to public policy, because anything that stimulates diligence and good faith between the contracting parties is highly promotive of the general as well as the individual good. (*Dover Glass etc. Co. v. American Fire Ins. Co.*, 264.)

6. **INSURANCE—CONDITIONS OF FORFEITURE** contained in an insurance policy are not favored, and these and like conditions are always construed strictly, so that a party claiming a forfeiture by reason of a violation thereof is not permitted to deprive the other party of the benefits of the right of indemnity for which he contracted if there is any doubt or uncertainty as to the terms of such conditions, the extent of their application, or the acts which constitute the alleged breach. (*Dover Glass etc. Co. v. American Fire Ins. Co.*, 264.)

7. **INSURANCE—CONDITIONS OF AVOIDANCE** contained in an insurance policy may be waived either by express agreement of the parties or necessary implication arising from their acts after notice of the breach. (*Dover Glass etc. Co. v. American Fire Ins. Co.*, 264.)

8. **INSURANCE—WAIVER OF CONDITIONS.**—The violations of any of the conditions in a policy of insurance may be waived by the insurer, and a waiver may be implied from the acts and conduct of the insurer after knowledge that such conditions have been broken. (*Horton v. Home Ins. Co.*, 717.)

9. **INSURANCE—WAIVER OF CONDITIONS.**—If an insurer, knowing the facts, does that which is inconsistent with an inten-

tion to insist upon a strict compliance with the conditions precedent of the contract of insurance, he must be treated as having waived their performance, and the insured may recover without proving performance, even though the policy provides that none of its conditions shall be waived except by written agreement. (*Horton v. Home Ins. Co.*, 717.)

10. **INSURANCE—WAIVER OF CONDITIONS.**—If an insurer, with knowledge that conditions have been broken, giving him the right to cancel a policy of insurance, fails to notify the insured within a reasonable time of his intention to cancel the policy, and fails to return the unearned premium as required by the policy, this must be taken as evidence showing a waiver of the breach of such conditions. (*Horton v. Home Ins. Co.*, 717.)

11. **INSURANCE—CONDITIONS—WAIVER BY AGENT.**—Conditions in a policy of insurance working a forfeiture are matters of contract and not of limitation, and may be waived by the insurer. Such waiver may be presumed from the acts of the local agent. (*Horton v. Home Ins. Co.*, 717.)

12. **INSURANCE—MISREPRESENTATIONS.**—Under the statutes of North Carolina, statements contained in any application for a policy of insurance, or in the policy itself, are representations and not warranties; and, if misrepresentations are made, they do not vitiate the policy, unless they materially contribute to the loss or fraudulently evade the payment of an increased premium. (*Albert v. Mutual Life Ins. Co.*, 693.)

13. **INSURANCE—DESCRIPTION OF PROPERTY.**—It is not necessary in insuring property that its locality be fixed by such technical, legal descriptions as are ordinarily employed in conveyances of real property. It is not material, therefore, in an action to recover on a policy insuring a dwelling-house and personal property therein against loss by fire that the block in which the dwelling was situated was described in the policy as being in Harlington addition to Mt. Tabor, whereas there is no such addition, and the property was in Harlem addition to East Portland. (*Baker v. State Ins. Co.*, 807.)

14. **INSURANCE—BREACH OF WARRANTY OF THE TITLE OF THE ASSURED.**—One in possession of real property under a contract of purchase entitling him to remain in possession, and to a conveyance of the title upon completing payment therefor in certain installments, is to be deemed the owner for the purpose of a policy of insurance, and is justified, in his answers in his application, in stating that he is the sole and undisputed owner of the property, and that the title is in his name. (*Baker v. State Ins. Co.*, 807.)

15. **INSURANCE—FRAUD IN ANSWER RESPECTING THE VALUE OF PROPERTY.**—An answer respecting the value of the land and buildings upon which insurance is sought will not be regarded as fraudulent unless so far at variance with the truth that a fraudulent purpose must be presumed. All that is required is the honest judgment or opinion of the applicant upon the subject. (*Baker v. State Ins. Co.*, 807.)

16. **INSURANCE—CONDITIONS AGAINST ENCUMBRANCES.** Conditions in a fire insurance policy prohibiting encumbrances and levies without the consent of the insurer, and declaring the policy to be void in case of a breach thereof, apply only to voluntary liens and levies, and not to involuntary encumbrances; such as tax liens and judgments procured in invitum. The violation of such conditions does not render the policy absolutely void, but voidable only

at the election of the insurer. (Dover Glass etc. Co. v. American Fire Ins. Co., 264.)

17. **INSURANCE—CONDITIONS AGAINST ENCUMBRANCES AND LEVIES—BREACH OF.**—Under conditions in a policy of fire insurance prohibiting encumbrances and levies on the insured property without the consent of the insurer, and declaring the policy to be void in case of a breach thereof, the act of the insured in giving mortgages, confessing judgments, and suffering levies of execution against the insured property without the consent or waiver of the insurer, constitutes a breach of such conditions and avoids the policy at the election of the insurer. (Dover Glass etc. Co. v. American Fire Ins. Co., 264.)

18. **INSURANCE.—CONDITIONS PROHIBITING ENCUMBRANCES AND LEVIES** upon insured property without the consent of the insurer, inserted in the policy and declaring it to be void in case of a breach thereof, are not only legal and conformable to public policy, but also reasonable and proper. (Dover Glass etc. Co. v. American Fire Ins. Co., 264.)

19. **INSURANCE—ENCUMBRANCES—CONDITIONS AGAINST—WHEN NOT ENFORCEABLE.**—If an insurance company issues a policy of insurance without requiring any application because its agent thinks he knows the condition of the property, and the policy contains a condition rendering it void if the property is encumbered, but the insured does not read the policy nor know of the condition until after a loss has occurred, the condition must be deemed waived. (Georgia Home Ins. Co. v. Holmes, 611.)

20. **INSURANCE—FIRE—CONDITIONS—WAIVER.**—Under conditions in a policy of life insurance providing that it should be void if, with the knowledge of the insured, foreclosure proceedings be commenced or notice given of sale of any property covered by the policy by virtue of any mortgage or trust deed, and also that if the policy should be canceled or become void the unearned portion of the premium paid should be returned, the insurer is liable for a loss, although the property insured is advertised for sale under a trust deed before the fire and loss, provided the insured has no notice or knowledge of such advertised sale, except such as is obtained from reading the advertisement before the fire, which advertisement the agent of the insurer has also seen, and the policy has not been canceled nor any part of the unearned premium returned to the insured prior to the fire. (Horton v. Home Ins. Co., 717.)

21. **INSURANCE—CONDITION PROHIBITING CESSATION OF OPERATION OF INSURED PROPERTY.**—A condition in a fire insurance policy forbidding the cessation of the operation of the insured establishment, without the consent of the insurer, and providing for the care and supervision of the workmen, and also providing that a breach of such condition shall avoid the policy, is broken, and the insurance terminated, when the business is discontinued and the operation of the establishment has ceased without the consent of the insurer, although watchmen are provided and kept in the establishment continually until the fire and loss occur. (Dover Glass etc. Co. v. American Fire Ins. Co., 264.)

22. **INSURANCE—CONDITION COMPELLING OPERATION OF INSURED ESTABLISHMENT.**—A condition in a policy of fire insurance forbidding the cessation of the operation of the insured establishment without the consent of the insured, is valid, reasonable and proper. (Dover Glass etc. Co. v. American Fire Ins. Co., 264.)

23. **INSURANCE—CONDITIONS CONCERNING WORKMEN IN INSURED ESTABLISHMENT.**—An insurer has a right to stipu-

late in a policy of fire insurance for the care and supervision of skilled workmen necessarily employed in running the insured establishment during the customary working season, and to make his liability dependent upon the fulfillment thereof. (*Dover Glass etc. Co. v. American Fire Ins. Co.*, 264.)

24. INSURANCE—HOUSE LET FOR IMMORAL PURPOSES.—A policy of insurance on a house leased by the owner to a lewd woman, with knowledge on his part that it is to be used by her for the purposes of prostitution, is not void so as to defeat a recovery in case of loss in the absence of any stipulation in the policy under which the immoral use of the house vacates the contract. In such case, the contract of insurance does not grow out of, nor is it connected with, the immoral and illegal use of the house; and, it is clearly disconnected from the contract of rental for such use. (*Phenix Ins. Co. v. Clay*, 307.)

25. INSURANCE—FIRE—TRANSFER OF POLICY—LOSS AFTER ADDITIONAL PREMIUM IS DEMANDED AND PAID—LIABILITY.—If an insurance company demands an additional premium, where an existing policy of fire insurance is about to be transferred on account of a change in the ownership of the property, and such additional premium is paid to the agent, who forwards the policy, by mail, to the company for the purpose of having it indorse thereon its consent to such transfer, the company is answerable where the property is destroyed by fire on the following day before such indorsement is made. (*Medearis v. Anchor Mut. Life Ins. Co.*, 428.)

26. INSURANCE—FIRE—ESTOPPEL—PROVISIONS IN POLICY AGAINST TRANSFER OF TITLE AND WAIVER OF CONDITIONS BY AGENT.—If the ownership of insured property is changed and the insurer agrees to consent to an assignment of the policy, and to indorse such consent thereon for an advanced rate, which the agent secures and transmits to the company, with the policy, according to his instructions, the company is estopped from taking advantage of provisions in the policy which render it void in case the legal title to the property is changed, and which prohibit an agent from waiving any of the conditions of the policy. (*Medearis v. Anchor Mut. Life Ins. Co.*, 428.)

27. INSURANCE—LIFE—INSURABLE INTEREST.—A policy of life insurance payable to one who has no interest in the life of the insured is valid and enforceable when the policy is taken out in good faith and the premium paid thereon by the insured. (*Albert v. Mutual Life Ins. Co.*, 693.)

28. INSURANCE—WRONGFUL CANCELLATION OF LIFE POLICY—REMEDY WHERE RISK HAS NOT ATTACHED.—If a policy of life insurance has been wrongfully canceled by the insurer, and the risk has not attached, all the premiums must be returned, and an action will lie for their recovery. (*Metropolitan Life Ins. Co. v. McCormick*, 392.)

29. INSURANCE—WRONGFUL CANCELLATION OF LIFE POLICY—REMEDY WHERE RISK HAS ATTACHED.—If a policy of life insurance has been wrongfully canceled by the insurer, the insured may obtain a reinstatement thereof, or maintain an action for damages, but he cannot maintain an action for the premiums paid where the risk has attached and the company has assumed liability in case of loss. (*Metropolitan Life Ins. Co. v. McCormick*, 392.)

30. INSURANCE—WRONGFUL CANCELLATION OF LIFE POLICY—REMEDY WHERE RISK HAS ATTACHED.—If a policy of life insurance has been duly issued, and is wrongfully canceled by the insurer, after the risk has attached, the insurer may sue for

damages and recover the present cash surrender value of the policy, or he may tender the premiums as they become due, and recover the full amount of the policy on the death of the insured, or he may proceed in equity, and have a decree sustaining and declaring valid the contract of insurance. (*Metropolitan Life Ins. Co. v. McCormick*, 392.)

31. **INSURANCE.—A MISREPRESENTATION** or untrue statement in an application for life insurance, if made in good faith, does not, under the statutes of Pennsylvania, avoid the policy, unless it relates to some matter material to the risk. (*March v. Metropolitan Life Ins. Co.*, 887.)

32. **INSURANCE—LIFE—MISREPRESENTATIONS.**—If, in an application for life insurance, false answers are given respecting matters material to the risk, the trial judge should direct a verdict in favor of the defendant. (*March v. Metropolitan Life Ins. Co.*, 887.)

33. **INSURANCE—MATERIALITY OF REPRESENTATION—WHEN A QUESTION OF LAW.**—When a statement or representation contained in an application for life insurance relates to the applicant being insured in any other company or to his having made an application for insurance and been rejected, or as to particulars of his having had ailments, such statement or representation must be adjudged material to the risk as a matter of law, and its materiality should not be submitted to the jury for decision. (*March v. Metropolitan Life Ins. Co.*, 887.)

34. **INSURANCE—LIFE—ANSWERS IN APPLICATION—WHEN DEEMED FALSE.**—If, in answer to the question whether he has ever spit blood, the applicant answers, "No," his answer must be deemed false if he has had an expectoration amounting to a hemorrhage. (*March v. Metropolitan Life Ins. Co.*, 887.)

35. **LIFE INSURANCE.—IF AN APPLICANT WAS AFFLICTED WITH AN OCCULT AILMENT**, unknown to her, her failure to communicate it cannot be regarded as a fraud upon the insurance company. (*March v. Metropolitan Life Ins. Co.*, 887.)

36. **INSURANCE—LIFE.**—Where an applicant for insurance is asked whether he is afflicted with consumption and answers, "No," his answer must be regarded as material and false if he is affected with that disease, if the circumstances show that the insured could not have been ignorant of the presence of the disease. (*March v. Metropolitan Life Ins. Co.*, 887.)

37. **LIFE INSURANCE—APPLICATION IS PRESUMPTIVELY CORRECT.**—Where certain questions and answers thereto appear in an application for a life insurance, and such answers are shown to be false, it is error for the court to instruct the jury that such answers are a fraud upon the company. "If those questions were asked." (*March v. Metropolitan Life Ins. Co.*, 887.)

38. **INSURANCE—LIFE—FALSE ANSWER MADE BY BENEFICIARY.**—If an application for insurance upon the life of a wife is signed by her husband and contains an absolutely false answer, the insurance being payable to him, he cannot recover on the ground that the wife did not sign the application and therefore was not guilty of misrepresentation. (*March v. Metropolitan Life Ins. Co.*, 887.)

39. **INSURANCE—LIFE—DEDUCTION OF UNPAID PREMIUM.**—Under a life insurance policy, the premium on which is payable annually in advance, of which only one quarterly installment has been paid at the time of the death of the insured, the insurer is entitled to have the amount of premium remaining due for

the current year deducted from the amount of the policy, before paying it. (*Albert v. Mutual Life Ins. Co.*, 693.)

40. INSURANCE AGAINST ACCIDENT—CONSTRUCTION OF POLICY.—Under an accident insurance policy for a specified sum, containing a condition that if "injuries are sustained while riding as a passenger in any passenger conveyance using steam, cable or electricity as a motive power, the amount to be paid shall be double the sum above specified," the insurer is liable under such double indemnity to an insured person who is injured while attempting to alight from a moving street-car using electricity as a motive power. In such case, the insured is a passenger until he has completely disconnected himself and alighted from such car. (*King v. Travelers' Ins. Co.*, 288.)

41. INSURANCE AGAINST ACCIDENT—TOTAL DISABILITY. Under a policy insuring against loss of time suffered through accidental injuries "wholly and continuously disabling the insured from transacting any and every kind of business pertaining to his occupation" of merchant, he may recover if accidentally thrown from his bicycle, thereby dislocating the thumb of his right hand, breaking loose some of his teeth, and so injuring or jarring his head and neck as to affect his spine and nerves to such an extent as to produce severe nervous prostration, rendering him wholly and continuously disabled from transacting any and every kind of business pertaining to his occupation. (*Lobdill v. Laboring Men's Mut. Aid Assn.*, 542.)

42. INSURANCE AGAINST ACCIDENT—TOTAL DISABILITY. Under a policy insuring against loss of time effected through accidental injuries "wholly and continuously disabling the insured from transacting any and every kind of business pertaining to his occupation," whole or total disability does not mean absolute physical inability to transact every kind of business pertaining to the occupation of the insured. It is sufficient if his injuries are of such character that common care and prudence require him to desist from the transaction of any such business so long as it is reasonably necessary to effect a cure. Inability to transact some kinds or branches of his business does not constitute total disability within the meaning of the policy, if he is able to transact other kinds or branches of his business. (*Lobdill v. Laboring Men's Mut. Aid. Assn.*, 542.)

43. INSURANCE AGAINST ACCIDENT—TOTAL DISABILITY. Under a policy insuring against loss of time effected by accidental injuries, "wholly and continuously disabling the insured from transacting any and every kind of business pertaining to his occupation," ability to occasionally perform some single and trivial act connected with some kind of business pertaining to his occupation does not render his disability partial instead of total, provided he is unable, substantially, or to some material extent, to transact any kind of business pertaining to such occupation. The frequency and nature of the acts done are ordinarily for the consideration of the jury in determining whether the insured is totally disabled within the meaning of the policy. (*Lobdill v. Laboring Men's Mut. Aid Assn.*, 542.)

44. INSURANCE—ACCIDENT—INTENTIONAL INJURY.—If a policy of accident insurance provides that the insurer shall not be liable for "intentional injury inflicted by the insured or any other person," there can be no recovery when injury to the insured is intentional as to the person inflicting it, though accidental as to the insured, in that he does not expect or anticipate it. (*Butero v. Travelers' Accident Ins. Co.*, 61.)

45. INSURANCE—ACCIDENT—EVIDENCE — INTENTIONAL INJURY.—Under an accident insurance policy providing that the insurer shall not be liable for intentional injury inflicted by the insured or any other person, evidence that the insured was killed by a pistol shot on a dark, stormy night while at work with a companion in a lighted shed, that the shot which killed him was followed by two others, each of which inflicted a mortal wound, and that one of the shots was fired so near him as to discolor his clothing with powder, is sufficient to establish the fact that he was intentionally murdered, by one who knew him, and no recovery can be had under the policy in such case. (*Butero v. Travelers' Accident Ins. Co.*, 61.)

46. INSURANCE—ACCIDENT—EVIDENCE.—If a policy of accident insurance provides that the insurer shall not be liable for injury intentionally inflicted by the insured or any other person, the insured cannot recover if the evidence of intentional injury preponderates against the presumption of accident. (*Butero v. Travelers' Accident Ins. Co.*, 61.)

47. BENEFICIAL ASSOCIATIONS—LEGISLATIVE POWERS—DELEGATION OF.—The supreme lodge of a beneficial association, such as the Knights of Pythias, cannot delegate to a subordinate managing committee the legislative power vested by the charter in the supreme lodge alone. Hence, a by-law or regulation adopted by such committee undertaking to forfeit a member's rights in the event of his suicide is inoperative. (*Supreme Lodge K. of P. v. Stein*, 589.)

48. BENEFICIAL ASSOCIATIONS.—THE CHARTER OF A BENEFICIAL ASSOCIATION is as much a part of the contract of insurance made by it as if written therein. (*Supreme Lodge K. of P. v. Stein*, 589.)

49. BENEFICIAL ASSOCIATIONS.—A CONDITION ADOPTED BY A BENEFICIAL ASSOCIATION AFTER issuing a certificate of insurance cannot affect rights of the holder of such certificate. (*Supreme Lodge K. of P. v. Stein*, 589.)

50. BENEFICIAL ASSOCIATIONS—CHANGE IN BENEFICIARY.—The right of a person designated as beneficiary in a certificate of membership depends on his continuance as such until the death of the member. Before that time the member may change the beneficiary, and thereby defeat his rights. (*Carson v. Vicksburg Bank*, 596.)

51. BENEFICIAL ASSOCIATIONS—CERTIFICATE IS PAYABLE ONLY TO BENEFICIARIES PROVIDED BY THE CHARTER OF THE ASSOCIATION.—If the charter of a beneficial association provides that an applicant for membership shall designate some person related to, or dependent upon, him for support, to whom the benefit shall be paid, that the amount of the benefit shall be held sacred as a legacy for the persons so named, and shall under no circumstances be appropriated to the payment of debts of the deceased member, and that if none of the designated beneficiaries shall be alive on the decease of the member, the benefit shall be paid to his heirs, and if there are none, the liability of the association shall cease and determine, a certificate cannot be pledged as collateral security for the payment of the member's debts, and if he causes his certificate to be surrendered, and designates a new beneficiary for the purposes of having him apply the proceeds to the payment of such debts, he will hold the proceeds of the certificate as a trustee for the widow and children of the deceased member. (*Carson v. Vicksburg Bank*, 596.)

52. A BENEFICIAL ASSOCIATION BY THE PAYMENT INTO COURT of the proceeds of a certificate of membership waives the

objection that a change in the beneficiary did not comply with the rules of the order; and no other person can urge the objection which the association has thus waived. (Hall v. Allen, 601.)

53. BENEFICIAL ASSOCIATIONS—CHANGE IN BENEFICIARY—WANT OF CONFORMITY TO THE LAWS OF THE ASSOCIATION, WHEN EXCUSED.—If the holder of a benefit certificate intends to change the beneficiary in accordance with the laws of the association, and does all he can toward that end, but does not comply with all of the requirements because of his physical inability and his not having the certificate in his possession, a change is thereby accomplished. The mode of changing beneficiaries pointed out by the laws of the association is not exclusive, at least, when it waives want of conformity to its laws. (Hall v. Allen, 601.)

54. BENEFICIAL ASSOCIATIONS—CONDITIONS IN APPLICATIONS FOR, AND IN A CERTIFICATE OF, INSURANCE, WHEN NOT BINDING.—If a member of a beneficial association is entitled to a certificate insuring his life, and a committee of the association, without authority, enacts a by-law imposing a condition against suicide, and he, in his application, assents to this condition, and the certificate purports to be subject thereto, he is not bound by the condition, because it was imposed without authority. (Supreme Lodge K. of P. v. Stein, 589.)

55. INSURANCE—NOTICE OF ASSESSMENT BY MUTUAL INSURANCE COMPANY — SUFFICIENCY OF.—A mutual insurance company, organized under a statute which expressly prohibits such companies from receiving premiums or making dividends, is not required to give the notice called for by a statute which provides that, in every instance, where a fire insurance company takes a note for the "premium" of any policy, such company shall not declare the policy forfeited or suspended for nonpayment of the note, without first giving a prescribed notice; and the failure of a mutual company to give such a notice is not material in an action on its policy. (Beeman v. Farmers' Pioneer Mut. Ins. Assn., 424.)

56. INSURANCE—ESTOPPEL OF MUTUAL INSURANCE COMPANY BY MAKING A SECOND ASSESSMENT.—If a person has insured his property for five years, in a mutual insurance company, and part of it is destroyed by fire, but the insured has the right at any time, within the life of the policy on its face, to pay delinquent assessments and restore the policy, there is no estoppel against the company, when suit is brought upon the policy, by reason of a second assessment made after a prior one has become delinquent, and before it is paid, for it is the right, if not the duty, of the association to make it. (Beeman v. Farmers' Pioneer Mut. Ins. Assn., 424.)

57. INSURANCE — ESTOPPEL OF MUTUAL INSURANCE COMPANY BY SECOND ASSESSMENT, OR ACCEPTANCE OF PAYMENTS.—If a person insures his property in a mutual insurance company, the laws of the association and the policy providing that if the insured fails to pay his assessment within a time specified, after receiving notice thereof, his insurance shall be null and void until such assessments are paid, neither the making of a second assessment after a former one has become delinquent, nor the acceptance of a payment of both assessments after a loss has occurred, will estop the company from denying its liability on the policy by reason of the failure of the insured to pay the prior assessment within the prescribed time. (Beeman v. Farmers' Pioneer Mut. Ins. Co., 424.)

58. INSURANCE — ESTOPPEL OF MUTUAL INSURANCE COMPANY BY ACCEPTING DELINQUENT AND OVERDUE ASSESSMENTS.—If a person has insured his property for five

years in a mutual insurance company, and a part of it is destroyed by fire, but he does not pay two assessments, one of which is delinquent, and the other overdue, until after the loss has occurred the acceptance of such payments is not a waiver of forfeiture of the policy, because of the delinquent assessment, where the insured has the right, under the laws of the association, to make such payments, when it is necessary to make them to restore the insurance provided for in the policy for the remainder of the period of five years, and where the association is bound to accept such payments in order to revive the policy for the remaining time it has to run. (*Beeman v. Farmers' Pioneer Mut. Ins. Assn.*, 424.)

59. AGENCY.—KNOWLEDGE OF A LOCAL INSURANCE AGENT is the knowledge of the insurance company employing him. (*Horton v. Home Ins. Co.*, 717.)

60. INSURANCE.—AN ACTION BY A MORTGAGEE may be maintained on a policy of insurance issued to and in the name of the mortgagor, providing that the loss shall be payable to the mortgagee as his interest may appear, where the amount of the debt secured by the mortgage exceeds the amount of the insurance and the whole value of the property. (*Lowry v. Insurance Co. of N. A.*, 587.)

61. INSURANCE—FIRE—ACTION ON POLICY—ADMISSIBLE EVIDENCE.—If a local insurance agent becomes the company's medium of communication with the insured, his acts are those of the company, and a conversation between such agent and the insured, as well as letters passing between such agent and the insurer, are admissible in evidence where suit is brought upon the policy. (*Medearis v. Anchor Mut. Life Ins. Co.*, 428.)

62. INSURANCE—FIRE—ACTION ON POLICY—HARMLESS ERROR IN ADMISSION OF EVIDENCE.—In an action against an insurance company, it is harmless error for the insured to testify that, after a conversation with the company's agent, he believed that he was insured in the defendant company, where its liability had already become fixed by an estoppel, resting upon undisputed testimony. (*Medearis v. Anchor Mut. Life Ins. Co.*, 428.)

63. INSURANCE—REFUSAL TO PAY LOSS—LIABILITY.—If questions of law made in an action to recover insurance, are of such character as to acquit the insurer of bad faith in refusing to pay the loss within the time limited by law, he is not liable for damages and attorneys' fees required by him to be paid in case he refuses in bad faith to pay the loss within sixty days after demand. (*Phenix Ins. Co. v. Clay*, 307.)

64. INSURANCE, LIFE—ACTION—DIRECTION OF VERDICT. In an action upon a policy of life insurance, where the defense is that the deceased committed suicide by taking cyanide of potassium, it is reversible error for the court to direct a verdict for the plaintiff, when there is some evidence, though circumstantial, in support of the issue tendered by the insurance company. (*Germania Life Ins. Co. v. Lewin*, 215.)

65. INSURANCE—LIFE—POLICY AS EVIDENCE.—In an action to recover on a life insurance policy, the beneficiary may offer such policy in evidence without the application therefor, as the policy constitutes the contract upon which the suit is brought, and the application is no part of the policy and is in the possession of the defendant. (*Albert v. Mutual Life Ins. Co.*, 693.)

66. INSURANCE, LIFE—EVIDENCE—ADMISSIBILITY OF INQUEST.—In an action on a policy of insurance upon the life of a person, since deceased, the verdict of a coroner's jury that the deceased committed suicide is not admissible in evidence to establish that fact as a defense. (*Germania Life Ins. Co. v. Lewin*, 215.)

67. INSURANCE—LIFE—EXPERT EVIDENCE.—In an action on a policy of life insurance, expert physicians who have personally examined the insured, and who as medical examiners for the insurer have passed upon the application upon which the policy is issued, may testify as to what they mean by the use of the word "paralysis" in their reports to the insurer. (*Albert v. Mutual Life Ins. Co.*, 693.)

See Attachment, 8, 9; Contracts, 8; Duress.

INTENT.

See Criminal Law.

INTEREST.

1. INTEREST—ALLOWANCE OF, ON JUDGMENTS.—At common law, judgments carried no interest. Its allowance on judgments is controlled entirely by statute. (*Hoyt v. Beach*, 461.)

2. INTEREST—JUDGMENT FOR COSTS AND ATTORNEY'S FEES.—If the allowance of interest on a judgment is not limited by statute, a judgment for costs and attorney's fees will draw interest from the date of its entry. (*Hoyt v. Beach*, 461.)

INTERSTATE COMMERCE

1. INTERSTATE COMMERCE—DELETERIOUS ARTICLE—POWER OF STATE.—A state has no right to interfere with, or to attempt to regulate, interstate commerce in an article on the ground that it is deleterious to the inhabitants of the state, so long as it is recognized in the commercial world, by the laws of Congress, and by the decisions of the courts as a commodity in which a right of traffic exists. (*McGregor v. Cone*, 522.)

2. INTERSTATE COMMERCE—SALE OF CIGARETTES—VIOLATION OF STATE STATUTE.—If an importer, after bringing into the state stamped packages of cigarettes, packed in a common pine box, for convenience of shipment, opens the box and sells one of the packages to a customer, who applies for it, the sale violates a statute of the state which prohibits the sale of cigarettes within the state by all persons except jobbers doing an interstate business. (*McGregor v. Cone*, 522.)

3. INTERSTATE COMMERCE—SALE OF CIGARETTES—REGULATION OF BY STATE—UNCONSTITUTIONAL STATUTE.—Cigarettes are a recognized commercial commodity. Hence, a state statute which prohibits the sale of cigarettes within the state by all persons except jobbers who do an interstate business with customers outside of the state is in contravention of section 8, article 1, of the federal constitution, conferring upon Congress the exclusive right to regulate commerce among the several states, and is void, so far as it amounts to such a regulation. (*McGregor v. Cone*, 522.)

4. INTERSTATE COMMERCE—"ORIGINAL PACKAGE"—WHAT IS.—An "original package," within the meaning of the interstate commerce law, is a bundle put up for transportation or commercial handling, and usually consists of a number of things bound together, convenient for handling and conveyance. It is the unit which the carrier receives, transports, and delivers as an article of commerce—the identical package delivered by the importer to the carrier at the initial point of shipment, in the exact condition in which it was shipped. (*McGregor v. Cone*, 522.)

5. INTERSTATE COMMERCE—CIGARETTES—"ORIGINAL PACKAGE"—DECISION OF REVENUE OFFICERS AS TO—FORCE OF.—In determining whether or not there has been a viola-

tion of a state anti-cigarette law, the fact that the internal revenue department has recognized a package containing ten cigarettes as an "original package," for the purpose of taxation, is not conclusive, as the repacking of such packages in additional coverings is optional with the manufacturer in placing them upon the market. The package so recognized is not the original package of commerce, within the meaning of the interstate commerce law. (*McGregor v. Cone*, 522.)

6. **INTERSTATE COMMERCE—CIGARETTES—"ORIGINAL PACKAGE"—COMMON PINE BOX.**—If packages of cigarettes, each package containing ten cigarettes, and sealed with an internal revenue stamp, are packed in a common pine box, for convenience of shipment, such box is the original package of commerce; and when it is opened or "broken," the packages of cigarettes are subject to the police power of the state as a part of the common mass of property therein. (*McGregor v. Cone*, 522.)

INTERSTATE COMMERCE.

See Taxes, 6, 7.

JOINT LIABILITY.

See Judgment, 28; Libel, 8; Partnership, 1.

JUDGMENT.

1. **JUDGMENT—"RENDITION"—LIEN—NECESSITY OF RECORD.**—A judgment is not rendered, so as to be a lien from the time of its "rendition" until it is entered on the records, as prescribed by the statute, although an entry or direction therefor has been signed by the judge and indorsed by the clerks as "filed." (*Callanan v. Votruba*, 538.)

2. **JUDGMENTS.—DOCKETING** of a judgment is not an essential condition of its efficacy, except for the purposes of a lien, and is not a condition precedent to issuing execution thereon to an officer where it is rendered or to an officer in any other county. (*Bernhardt v. Brown*, 725.)

3. **A MOTION FOR JUDGMENT ON THE PLEADINGS**, based on the facts thereby conceded, cannot be sustained, except where, under such facts, a judgment different from that pronounced could not be rendered, notwithstanding any evidence which might be produced. In other words, it cannot be sustained unless, under the admitted facts, the moving party is entitled to judgment, without regard to what the findings might be on the facts upon which issue is joined. (*Mills v. Hart*, 241.)

4. **A MOTION FOR JUDGMENT ON THE PLEADINGS** cannot, under the guise of such a motion, be substituted for some other plea. (*Mills v. Hart*, 241.)

5. **A MOTION FOR JUDGMENT ON THE PLEADINGS** cannot prevail, unless, on the facts thereby established, the court can, as a matter of law, pronounce a judgment on the merits, one final between the parties. (*Mills v. Hart*, 241.)

6. **JUDGMENT ON THE PLEADINGS—RIGHT TO, HOW DETERMINED.**—In determining the right of a party to a judgment given him on the pleadings, the real question to determine is the sufficiency of the admitted facts to warrant the judgment rendered, and the materiality of those upon which issue is joined. (*Mills v. Hart*, 241.)

7. **JUDGMENT—WHEN NUNC PRO TUNC ORDERS SHOULD BE GRANTED.**—The action of a court cannot be falsified by the failure of a mere ministerial officer to perform his duty, and

the plaintiff has a right to have the record show what the court did in his case. Hence, if a decree has been prepared and signed by the judge, and given to the clerk, who files, but fails to record it, the plaintiff is afterward, if no rights of third parties have intervened or will be affected thereby, entitled to a *nunc pro tunc* order requiring the clerk to record the decree, irrespective of the question whether the proceedings in the case were regular or irregular, valid or invalid. (*Day v. Goodwin*, 465.)

8. JUDGMENT—RECORD—VALIDITY.—The record is the only proof of a judgment, and it is, therefore, essential to the validity of a judgment that it be spread upon the records as required by law. (*Callanan v. Votruba*, 538.)

9. JUDGMENT.—THE RATIFICATION OF A JUDGMENT BASED ON AN UNAUTHORIZED APPEARANCE of an attorney does not result from an offer to pay a lesser sum in full satisfaction, such offer being rejected. (*Handley v. Jackson*, 839.)

10. JUDGMENT ON DEMURRER—WHAT CONTROLS.—Statements in the memorandum of the trial judge as to what questions were argued, submitted, and decided by him on demurrer cannot control or affect the positive language of his decision. (*Meyers v. Chicago etc. Ry. Co.*, 579.)

11. PRACTICE.—THE RELIEF WHICH CAN BE GRANTED UPON A JUDGMENT BY DEFAULT cannot exceed that demanded in the complaint. Hence, if the complaint prays that the defendant be restrained from transferring certain property, it is error, in a decree entered upon default, to provide that the defendant transfer such property to a receiver. (*Foley v. Foley*, 147.)

12. A JUDGMENT IS AN ENTIRETY, and if void as to one of the defendants is void as to all, as where one of the defendants is dead when it was rendered. This rule is not abrogated by a statute declaring that one of several appellants shall not secure a reversal as to himself by assigning some error in a judgment valid as to him, which judgment does not affect his rights, but does constitute reversible error as to the other appellants. (*Weis v. Aaron*, 594.)

13. A JUDGMENT AGAINST A PERSON DEAD AT THE TIME OF ITS RENDITION is void, and is therefore subject to collateral assault. (*Weis v. Aaron*, 594.)

14. JUDGMENTS—IMPROPER SERVICE OF SUMMONS.—A summons illegally issued and illegally served does not bring the defendant into court. A judgment rendered upon such service is void. (*Durham Fertilizer Co. v. Marshburn*, 708.)

15. JUDGMENT—IMPROPER SERVICE OF SUMMONS.—A justice's judgment against a nonresident defendant, on whom process was not served at least ten days before the return day, as required by statute, is void. (*Durham Fertilizer Co. v. Marshburn*, 708.)

16. JUDGMENTS, IF ERRONEOUS, may be remedied by appeal. (*Bear v. Board of Co. Commrs.*, 711.)

17. JUDGMENTS.—IRREGULAR JUDGMENTS ARE VOIDABLE and may be set aside on motion. (*Bear v. Board of Co. Commrs.*, 711.)

18. JUDGMENT—FRAUD AS A GROUND FOR A MOTION TO VACATE.—Where the statute authorizes a court to grant relief from a judgment suffered by a party through his mistake, inadvertence, surprise, or excusable neglect, he is entitled to relief, if, by any fraud of his adversary, he was prevented from appearing and answering in due time. (*Thompson v. Connell*, 818.)

19. JUDGMENT—PROCEEDING TO ANNUL—PARTIES.—In a proceeding, either at law or in equity, to annul a judgment, all of

the parties to the judgment should be made parties. (Day v. Goodwin, 465.)

20. JUDGMENT—DEFECTIVE SERVICE OF PROCESS—WHEN EXTRINSIC FACTS TO DEFEAT ARE AVAILABLE ONLY ON DIRECT ATTACK.—Although the service of notice of the pendency of an action is irregular and insufficient, yet, if the court assumes jurisdiction, the judgment is not void, where the service appears, upon the face of the record, to be good. Hence, extrinsic facts relied upon to defeat it can be shown only in a direct attack on the judgment. (Day v. Goodwin, 465.)

21. JUDGMENT—DEFECTIVE SERVICE OF PROCESS ON PARTY ADJUDGED INSANE—EFFECT OF.—If a wife has been adjudged insane, but is living with her husband when both are made parties defendant to a foreclosure action, and notice of the pendency of the action is served upon both, the judgment therein is not void, though a strict compliance with the statute, in such a case, would have required the notice to her to be also served upon her husband. (Day v. Goodwin, 465.)

22. JUDGMENTS.—RELIEF WILL NOT BE GRANTED IN EQUITY against a judgment at law, unless some meritorious and sufficient defense exists to the action at law or to some substantial part thereof. (Handley v. Jackson, 839.)

23. JUDGMENT—RELIEF FROM AN EQUITY AFTER AN UNSUCCESSFUL MOTION IN THE ORIGINAL ACTION.—Where a party against whom a judgment has been entered moves in the original action to have it set aside, and such motion is there denied, he cannot maintain a suit in equity for relief based upon the same grounds, they being, if established by the evidence, sufficient to have warranted the granting of relief on the motion. (Thompson v. Connell, 818.)

24. RELIEF FROM A JUDGMENT WILL BE DECREED IN EQUITY upon there appearing any fact clearly proving that it is against conscience to execute the judgment, and that the injured party could not have availed himself of this fact in the court of law, or if he could have so availed himself, that he was prevented from doing so by fraud or accident unmixed with any fault or negligence in himself or his agents. (Handley v. Jackson, 839.)

25. A JUDGMENT BASED ON AN UNAUTHORIZED APPEARANCE OF ATTORNEY will be relieved against in equity, and the want of authority on the part of the attorney may be proved by parol. This rule is equally applicable whether the attorney be responsible or not, and whether or not he acted by the procurement or collusion of the adverse party. (Handley v. Jackson, 839.)

26. JUDGMENTS GENERALLY ARE CONCLUSIVE, except for fraud or mistake. (Bear v. Board of Co. Commrs., 711.)

27. JUDGMENTS—CONCLUSIVENESS.—A judgment against parties present before a competent court is conclusive of matters adjudged therein. (Bear v. Board of Co. Commrs., 711.)

28. A JUDGMENT FOR OR AGAINST ONE DEFENDANT cannot be res judicata for or against another where they are entitled to, and demand, separate trials, or where for some other reason one of them is not a party to a judgment, or is entitled to relief from a judgment against himself and the other. (Handley v. Jackson, 839.)

29. JUDGMENTS AGAINST CORPORATIONS—CONCLUSIVENESS.—A valid judgment against a corporation binds the stockholders in respect to corporate matters. Such judgment is not open to collateral attack. (Bear v. Board of Co. Commrs., 711.)

30. JUDGMENTS—CONCLUSIVENESS.—In a proceeding to compel the levy of taxes, to pay a judgment against commissioners of a

county, it is no defense that such judgment was rendered on a void claim. (Bear v. Board of Co. Commrs., 711.)

81. JUDGMENTS AGAINST COUNTIES OR CITIZENS—CONCLUSIVENESS.—A judgment against a county or its legal representatives is a matter of general interest to all of its citizens, and is binding upon them, although they are not made parties thereto, unless it is impeached for fraud or mistake. (Bear v. Board of Co. Commrs., 711.)

82. JUDGMENT AGAINST PRINCIPAL—EFFECT OF AS AGAINST SURETIES.—Sureties upon a probate bond are, in the absence of fraud or collusion, concluded by the decree of a proper court rendered upon an accounting of their principal. (Meyer v. Barth, 124.)

83. JUDGMENT—CONFESSION OF IN ONE STATE UPON POWER OF ATTORNEY EXECUTED IN ANOTHER.—A note dated and executed in Illinois and purporting to waive the benefit of the exemption laws of that state, and to authorize any attorney in any court of record to appear for the maker and to confess judgment without process in favor of the holder of such note for such amount as may appear to be unpaid thereon, authorizes the confession of judgment in another state by any attorney thereof. (Pirie v. Stern, 103.)

84. A JUDGMENT CONFESSED BY A MARRIED WOMAN is presumptively valid. (Stahr v. Brewer, 883.)

85. JUDGMENT BY CONFESSION—ATTORNEY'S FEES IN.—Where a note authorizes the confession of judgment thereon by any attorney, including ten per cent attorneys' fee, a judgment so confessed including such fees is not void, where it is not shown that the attorneys' fees were unreasonably large or were a mere cloak for a fraudulent transfer of property without consideration. (Pirie v. Stern, 103.)

See Executions, 2, 3; Husband and Wife, 8-10; Intent, 1, 2.

JUDICIAL NOTICE

See Evidence.

JUDICIAL SALES.

1. JUDICIAL SALES—JURISDICTION.—In a proceeding to sell land for assets under order of court, the court has all the power necessary to accomplish its purpose; and, when relief can be given in the pending action, it must be done by motion in the cause, and not by an independent action. (Marsh v. Nimocks, 715.)

2. JUDICIAL SALE—ACTION AGAINST DEFAULTING BIDDER.—An independent action cannot be maintained against a defaulting bidder at a judicial sale to recover the amount of his bid, nor against one who has raised such bid at a sale for deficiency between the original bid and the bid approved on a resale, unless final judgment has been rendered in the action in which the sale was made. The remedy is by motion in the original action. (Marsh v. Nimocks, 715.)

3. JUDICIAL SALES—RESALE—PRACTICE.—If a judicial sale has been set aside and a resale ordered on an advanced bid, the resale should be started on such bid; and, in default of other bidders, the party making such advanced bid should be declared the purchaser. Upon the failure of such bidder to comply with his purchase, a motion should be made in that action for him to show cause why judgment should not be rendered against him. (Marsh v. Nimocks, 715.)

JURISDICTION.

See Appeal, 13, 14.

JUSTICE OF THE PEACE.

See Pleading, 7; Process, 3.

LANDLORD AND TENANT.

LANDLORD AND TENANT.—Lessees of water power and a dam, who have another dam lower down the stream, have no other or greater rights in respect to the accumulation of water, or lowering the level of the water, than their lessor possesses. (Smith v. Youmans, 30.)

See Crops; Duress.

LARCENY.

LARCENY—SWARM OF BEES—TRESPASSER.—A trespasser who finds a bee tree on another's land, and, without the latter's permission, chops it down and hives the bees in a gum not owned by himself, has no interest in them which is the subject of larceny. (State v. Repp, 463.)

LAW OF THE CASE.

See Appeal, 22.

LAW PARTNERSHIP.

See Attorney and Client, 1-3.

LEASE.

See Assignment, 3; Homestead, 2; Landlord and Tenant.

LEGACIES.

1. LEGACIES—EFFECT OF INOPERATIVE BEQUEST.—If a bequest is inoperative, the property affected by it passes to the residuary estate. (Moran v. Moran, 443.)

2. LEGACIES—UPHOLDING OF BEQUESTS FOR A LAWFUL PURPOSE.—A bequest for a known, lawful purpose, should, where the power of execution is prescribed and available, never fail for want of a name or a legal classification, unless it is in obedience to a positive rule of law. (Moran v. Moran, 443.)

LIBEL.

1. LIBEL—LANGUAGE LIBELOUS PER SE—DAMAGES—PRESUMPTION.—If defamatory language is libelous per se, the law presumes general damages as a natural and probable consequence. (Tracy v. Hacket, 398.)

2. LIBEL.—A TELEGRAPHIC MESSAGE directed and sent to a clergyman stating that "the citizens of Wisconsin demonstrated you are an unscrupulous liar," is libelous per se. (Monson v. Lathrop, 54.)

3. LIBEL.—THE PUBLICATION OF A LIBEL MAY BE THE JOINT ACT of two or more persons, who may be sued either jointly or separately, at the election of the plaintiff. (Monson v. Lathrop, 54.)

4. LIBEL—TELEGRAM—PUBLICATION.—The writing of a libelous telegraphic message and the delivery of it to the telegraph company for transmission constitute a publication thereof. (Monson v. Lathrop, 54.)

5. LIBEL—EVIDENCE—PLAINTIFF'S CHARACTER.—The defendant may, under the general denial in a civil action for libel,

prove, in mitigation of damages, that the plaintiff's general character is bad. (Tracy v. Hacket, 398.)

6. **LIBEL.—THE AMOUNT OF DAMAGES**, in a civil action for libel, is peculiarly within the province of the jury. (Tracy v. Hacket, 398.)

7. **LIBEL—CHARGE OF FELONY.—DAMAGES** may be recovered in a civil action for libel, which contains a charge of felony, without any allegation of special damages. (Tracy v. Hacket, 398.)

8. **LIBEL—EXEMPLARY DAMAGES** cannot be allowed in a civil action for libel where the wrong is of such a nature that the defendant would be liable to a criminal prosecution therefor. Compensatory damages only are allowable in such a case. (Tracy v. Hacket, 398.)

9. **LIBEL—REVERSAL OF JUDGMENT FOR FAILURE TO ASSESS NOMINAL DAMAGES.**—Although the plaintiff, in a civil action for libel, is entitled to a verdict for nominal damages for an invasion of his legal right by a defamatory publication, imputing a crime to him, and which has not been justified, yet a failure of the jury to award him nominal damages is not sufficient ground for reversing a judgment for the defendant, as the case is not one in which a permanent right is affected. (Tracy v. Hacket, 398.)

LIENS.

1. **LIEN OR PREFERENCE OUT OF PROCEEDS OF PROPERTY.**—Necessary expenses incurred in caring for property, since they are for the common benefit of all, may be recovered as a privileged claim when made by a party in interest. Hence, if crops to be grown on a farm are conveyed by deed of trust, after which the grantor dies, either his administrator or the trustee properly making advances for the cultivation of the crop is entitled to be indemnified therefrom for the amount of such advances. (Cox v. Martin, 604.)

2. **LIEN ON STOLEN MONEYS.**—One whose moneys have been stolen and have been deposited by thieves with a third person, to secure him against loss for becoming surety on their appearance bond, has no lien on such moneys which may be enforced by garnishment. (Holker v. Hennessey, 642.)

LIMITATIONS OF ACTIONS.

1. **LIMITATION OF ACTIONS—ACCRUAL OF RIGHT OF ACTION.**—If judgment is recovered against a stockholder in a national bank for an assessment under the individual liability imposed by the "national banking act" the stockholder's right of action against the directors of the bank through whose negligence he purchased the stock assessed, does not accrue with the payment of such judgment. (Houston v. Thornton, 699.)

2. **BURDEN OF PROOF.—STATUTE OF LIMITATION** pleaded as a defense casts the burden of proof upon the plaintiff to show that his action was commenced within the time limited by such statute. (Houston v. Thornton, 699.)

3. **PRINCIPAL AND SURETY—STATUTE OF LIMITATIONS.** A partial payment of a debt by the principal does not suspend the running of the statute of limitations in favor of the surety. (Mozingo v. Ross, 387.)

4. **PRINCIPAL AND SURETY—STATUTE OF LIMITATIONS.** THE ABSENCE FROM THE STATE of the principal debtor does not suspend the running of the statute of limitations in favor of his surety. (Mozingo v. Ross, 387.)

5. **LIMITATIONS.**—Part payment of a promissory note before the statute of limitations attaches takes it out of the statute as to

the person making such payment and as to joint obligors with him. (Maddox v. Duncan, 678.)

6. STATUTE OF LIMITATIONS—MAKER AND INDORSER.—Part payment of a promissory note by a maker cannot prevent the statute of limitations from running in favor of the indorser, though by the statutes of the state the maker and indorser may be sued jointly. (Maddox v. Duncan, 678.)

See Mortgage, 16.

MARRIAGE AND DIVORCE.

1. MARRIAGE CONTRACTED BY RESIDENTS OF ONE STATE GOING INTO ANOTHER TO AVOID THE LAWS OF THE FORMER.—If the statutes of a state declare that a decree annulling or dissolving a marriage shall terminate it as to both parties, except that neither shall be capable of contracting marriage with a third person until the suit has been heard on appeal, or the time for such appeal has expired, a marriage between a party to such decree and a third person resident of the state, contracted in another state, to which they went for the purpose of solemnizing their marriage, is void in the state of their domicile. (McLennan v. McLennan, 835.)

2. MARRIAGE—EVIDENCE—MUTUAL CONSENT.—The relationship of husband and wife is established by evidence showing that prior to a certain date, the parties lived together, in good faith, as husband and wife, though one of them was under a disability, but that immediately prior to that date the disability was removed, and that subsequent to that date they lived together, in good faith, as husband and wife. (Poole v. People, 245.)

3. MARRIAGE—VOID CONTRACT OF, BY REASON OF DISABILITY—STATUS OF PARTIES AFTER REMOVAL OF DISABILITY.—Although a man and woman desire marriage, and do what they can to render their union matrimonial, the marriage contract is void if one of them is under a disability, but if they live together as husband and wife after such disability is removed, they are, in law, husband and wife, from the time of such removal, where the law requires only mutual consent to make the parties husband and wife. (Poole v. People, 245.)

4. PRACTICE.—ISSUES OF FACT DO NOT EXIST IN A SUIT FOR A DIVORCE when there has been no answer, though the code provides that no divorce can be entered upon the default of the defendant, but the court must, in all cases, require proof of the facts alleged before granting relief. Such an issue arises only when a material averment of fact is made by one party and controverted by another. (Foley v. Foley, 147.)

5. DIVORCE—CRUEL AND INHUMAN TREATMENT.—Evidence that husband and wife have lived in the same house, and eaten at the same table food prepared by her, without his speaking to her except in anger, for three months at a time, is sufficient to establish cruel and inhuman treatment on his part and to justify the court in granting her a divorce. (Reinhard v. Reinhard, 66.)

6. DIVORCE—CRUEL AND INHUMAN TREATMENT.—Personal violence, whether actual or threatened, or even gross and abusive language, is not absolutely essential to constitute cruel and inhuman treatment warranting the granting of a divorce to the injured party. (Reinhard v. Reinhard, 66.)

7. MARRIAGE AND DIVORCE—FINAL DIVISION OF PROPERTY.—The conclusion of the court in divorce proceedings to make a final division of the property of a husband upon proper proof is subject to change and modification prior to the entry of judg-

ment, and is not a final division within the meaning of a statute providing that when the estate of the husband is finally divided in such case, no other provision can thereafter be made for the wife. (Reinhard v. Reinhard, 66.)

See Wills, 6.

MARRIED WOMEN.

See Husband and Wife; Judgment, 84.

MARSHALING SECURITIES.

See Homestead, 1.

MASTER AND SERVANT.

1. **MASTER AND SERVANT.**—A master is liable for the willful and wrongful act of his servant directly within the scope of his employment, though not sanctioned nor ratified by the master. (Bryan v. Adler, 99.)

2. **COLORED PERSON—REFUSAL OF A WAITER IN A RESTAURANT TO SERVE—LIABILITY OF MASTER.**—Under the statutes of Wisconsin, declaring all persons to be entitled to the full and equal enjoyment of the accommodations and privileges of inns, restaurants, saloons, eating-houses, and other places of accommodation and amusement, and that every person violating such statute shall be liable to the person aggrieved in a sum specified as damages, with costs, the keeper of a restaurant wherein the waiters refused to serve a colored man with food is liable to him, though the action of the waiters was not sanctioned nor ratified by their employer. (Bryan v. Adler, 99.)

3. **MASTER AND SERVANT—PROMISE TO REMOVE PERIL—WHEN SERVANT MAY RELY THEREON.**—If a danger is disclosed by a servant to his master, which the latter promises to remove, the servant is not to be deemed to assume the risk of continuing in the employment, unless the danger is so great, constant, and immediate that no person of ordinary prudence would ordinarily subject himself to it for the limited time necessary for the master, with reasonable diligence, to remove it. (Maitland v. Gilbert Paper Co., 137.)

4. **MASTER AND SERVANT—INCOMPETENT SERVANT.**—A MASTER IS NOT NECESSARILY LIABLE to one employé for injury resulting from the incompetency of another. If the master uses ordinary care in respect to employing competent servants, having regard to the character of the particular service and the consequences that may probably result from the incompetency of such servant, and an incompetent servant is nevertheless employed, a resulting injury to a fellow-servant cannot be legally chargeable to the master. (Maitland v. Gilbert Paper Co., 137.)

5. **MASTER AND SERVANT—RETENTION OF INCOMPETENT SERVANT—LIABILITY FOR.**—Though a master, after being notified of the incompetency of an employé, retains him in his employment, and from such incompetency an accident results, causing personal injury to a fellow employé, the latter cannot recover of the common master, unless he ought reasonably to have apprehended that the retention of the incompetent employé would, or might, probably, imperil the personal safety of his coemployés. (Maitland v. Gilbert Paper Co., 137.)

6. **MASTER AND SERVANT—INCOMPETENT SERVANT—ACTS OF FOR WHICH MASTER IS ANSWERABLE TO A FELLOW-SERVANT.**—One employed as a fireman and having capacity to do the acts required of him as such may, nevertheless, be re-

garded as an incompetent employé for whose acts the employer is liable, where the incompetency is manifested in his not having sufficient capacity to understand and obey rules requiring him not to disturb other parts of the machinery with which he had nothing to do, and he, by violating these rules, imperils the safety of his fellow-employés. (Maitland v. Gilbert Paper Co., 137.)

7. MASTER AND SERVANT—ASSUMPTION OF RISK.—The doctrine of assumption of risk has no application where the law requires the adoption of new devices to save life or limb, and the employé, either ignorant of that fact or expecting daily compliance with the law, continues in the service with the appliances formerly in use. (Greenlee v. Southern Ry. Co., 734.)

8. MASTER AND SERVANT—ASSUMPTION OF RISKS BY REMAINING WITH AN INCOMPETENT FELLOW-SERVANT.—If an engineer notifies his employer of the incompetency of a fireman, but is induced to continue in the service on the promise that such fireman will be removed, he does not assume the risk of injury from the incompetency of the fireman by remaining in the employment a reasonable time, relying on the promise that the fireman will be removed. (Maitland v. Gilbert Paper Co., 137.)

See Railroad Companies.

MAYHEM.

1. MAYHEM AND MAIM ARE EQUIVALENT WORDS and mean the privation of the use of a limb or member of the body, by which one is rendered unable to defend himself or annoy his adversary. Hence, the biting of an ear does not constitute a maiming. (State v. Johnson, 769.)

2. MAYHEM—INDICTMENT.—The malicious biting by one of the ear of another cannot be charged in an indictment as done with intent to maim, as biting of an ear does not constitute mayhem. (State v. Johnson, 769.)

3. MAYHEM — INDICTMENT — CONVICTION OF INFERIOR OFFENSE.—Under an indictment charging the malicious biting by one of the ear of another, with intent to maim, the accused may be properly convicted and punished for the inferior offense of aggravated assault and battery. (State v. Johnson, 769.)

4. MAYHEM—INDICTMENT—VARIANCE.—The unlawful biting of an ear, with intent to disfigure, is not an offense inferior to that of biting it with an intent to maim under the statute. An indictment charging the biting to have been done with intent to maim is not supported by evidence of biting with an intent to disfigure. In such case, there is a material variance between the proof and the allegation. (State v. Johnson, 769.)

MECHANIC'S LIEN.

1. MECHANIC'S LIEN—PERSONAL LIABILITY.—An owner of property who fails to have recorded his contract with the original contractor is not thereby made personally liable to a subcontractor. (Madera Flume etc. Co. v. Kendall, 177.)

2. MECHANICS' LIENS—BONA FIDE PURCHASERS.—A mechanic's lien holder is not a purchaser within the meaning of a statute providing that unrecorded conveyances shall be void as against subsequent purchasers in good faith and for a valuable consideration whose conveyances are first duly recorded. (Mathwig v. Mann, 47.)

3. MECHANIC'S LIEN.—A NOTICE OF A CLAIM for a mechanic's lien which states the name of the contractor and of the

owner of the property, but omits to state the name of the person for whom the claimant furnished material, is fatally defective. (*Madera Flume etc. Co. v. Kendall*, 177.)

4. **MECHANIC'S LIEN.**—A NOTICE OF A CLAIM for a mechanic's lien required to be made and filed for record cannot be amended or reformed. The notice of the claim must be perfect when filed. (*Madera Flume etc. Co. v. Kendall*, 177.)

5. **MECHANIC'S LIEN ATTACHES, WHEN, TO TITLE OR INTEREST ACQUIRED WHILE CONTRACT IS BEING PERFORMED.**—If one in possession of land falsely represents that he owns it, or has an interest therein to which a lien can attach, and materials for improvements are furnished to him on the strength of such representations, but he afterward acquires a life estate in the land and more materials are furnished under the same contract, a lien for all of the materials attaches to the life estate. (*Floete v. Brown*, 434.)

6. **MECHANIC'S LIEN—ORAL CONTRACT.**—The fact that a contract is oral does not relieve the claimant of a mechanic's lien from complying with the provision of the statute requiring every person to state in his claim or notice of lien the facts specified in the statute. (*Madera Flume etc. Co. v. Kendall*, 177.)

7. **MECHANIC'S LIEN—ENFORCING AGAINST PART OF A SYSTEM FOR SUPPLYING AND DISTRIBUTING WATER.**—If a canal is projected in sections, two only of which are completed, and, when so completed, a pre-existing pipe line is used in connection therewith, and the owner has a pre-existing system of reservoirs and ditches, all intended to collect, store, and supply water for irrigation, one who has contracted to supply materials or perform work upon one of the sections of such canal may claim and enforce a lien thereon without including the contemplated parts of the canal which have not been constructed, or the pipe line, or such other property of the owner forming part of the general system, but existing before, and capable of being used independently of, the canal. (*Pacific R. M. Co. v. Bear Valley Irrigation Co.*, 158.)

8. **MECHANICS' LIENS — MORTGAGES — PRIORITY.**—Although a statute provides that a mechanic's lien shall have priority over any lien originating subsequently to the commencement of the construction of the building, such mechanic's lien is not superior to the lien of a mortgage, executed prior to, but recorded after, the commencement of such construction. (*Mathwig v. Mann*, 47.)

9. **MECHANICS' LIENS—MORTGAGES—PRIORITY.**—If mortgages are both executed and delivered, and the money which they are given to secure is advanced, before the commencement of the construction of a building on the mortgaged premises, liens for labor and material used in such building are subject to the liens of the mortgages, though the latter are not recorded. (*Mathwig v. Mann*, 47.)

10. **LIENS—LESSEE AND MECHANIC—PRIORITY.**—The lien of a lessee of a life estate is superior to a mechanic's lien for materials furnished prior to the lease, where the lease was made before the statement of the mechanic's lien was filed and after the expiration of the time during which the statute would protect a mechanic's lien without a statement, and where the lessee had no actual notice of such lien. (*Floete v. Brown*, 434.)

See Assignment, 2.

MINES AND MINING.

See Cotenancy, 1-2.

MORTGAGE.

1. **MORTGAGES—POWER OF SALE—DEATH OF MORTGAGOR.**—A power of sale contained in a mortgage does not cease nor become inefficacious upon the death of the mortgagor. (Carter v. Slocomb, 714.)

2. **MORTGAGES—POWER OF SALE—EXERCISE OF AFTER DEATH OF MORTGAGOR.**—A sale of land by a mortgagee, made after the death of the mortgagor, under a power given by the mortgage, though without notice to the heir, is valid. (Carter v. Slocomb, 714.)

3. **MORTGAGE—AGREEMENT TO PAY TAXES.**—A separate agreement by a mortgagor to pay taxes on the lands mortgaged not incorporated in the contract of mortgage does not forfeit or otherwise affect the mortgagee's right to collect the interest stipulated for in such mortgage. (London & S. F. Bank v. Bandmann, 179.)

4. **MORTGAGE—WAIVER OF RIGHT OF THE MORTGAGEE ARISING FROM A FORBIDDEN AGREEMENT TO PAY TAXES.**—Where the laws of a state provide that the mortgagee shall pay taxes on his mortgage interest and that any agreement to the contrary shall deprive the mortgagee of all right to collect interest, the mortgagor, after paying interest in accordance with a forbidden agreement, cannot complain. (London & S. F. Bank v. Bandmann, 179.)

5. **MORTGAGE—CHANGE IN THE FORM OF THE DEBT.**—A statute providing that a mortgage shall not be created, renewed, or extended except by a writing executed with the formalities required in the case of a grant of real property, does not prevent the mortgage from continuing to operate as security for indebtedness, the form of which has been changed by giving a new note therefor, though but for the giving of such new note the pre-existing evidence of indebtedness would be barred by the statute of limitations. (London & S. F. Bank v. Bandmann, 179.)

6. **MORTGAGE—CHANGE IN THE FORM OF THE DEBT—STATUTE OF LIMITATIONS.**—A change in the form of a debt secured by a mortgage does not satisfy it. Though such debt was evidenced by notes which have become barred by the statute of limitations, yet if new notes have been given therefor, so that the mortgagee still retains a right of action on them, the mortgage can be foreclosed irrespective of the lapse of time, where the mortgage describes no particular notes, but purports to be to secure "the present indebtedness" of the mortgagor to the mortgagee and such advances as may thereafter be made by the latter to the former. (London & S. F. Bank v. Bandmann, 179.)

7. **MORTGAGES — ASSIGNMENT — RECORD — NOTICE.**—The record of an assignment of a mortgage is constructive notice to all persons of the rights of the assignee, as against any subsequent acts of the mortgagee affecting the mortgage, save only as excepted by statute. A second mortgagee, or the assignee of his mortgage, is not within the statutory exceptions. (Robbins v. Larson, 572.)

8. **MORTGAGES — ASSIGNMENT — RECORD — NOTICE TO SECOND MORTGAGEE.**—A statute providing that "the recording of the assignment of a mortgage shall not, in itself, be deemed notice of such assignment to the mortgagor, his heirs or personal representatives, so as to invalidate any payment made by them, or either of them, to the mortgagee," applies only to the parties therein named, and not to a second mortgagee or his assignee. (Robbins v. Larson, 572.)

9. **MORTGAGES — ASSIGNMENT — NOTICE — RIGHTS OF FIRST AND SECOND MORTGAGEES.**—If the assignee of a first

mortgage has had his assignment duly recorded before the execution of a second mortgage, the assignee of the latter is not entitled to have the former canceled on the ground that, subsequent to the assignment of the first mortgage, it was paid to the mortgagee without actual notice of the assignment. (*Robbins v. Larson*, 572.)

10. JUDGMENT—FORECLOSURE—SERVICE OF PROCESS—PERSONAL JUDGMENT AGAINST ONLY ONE DEFENDANT—VALIDITY OF DECREE AS TO ALL.—If a decree in a mortgage foreclosure suit, where the plaintiff asks a judgment of foreclosure against all of the defendants, is entitled as against all of them, recites due and legal service, adjudges them all to be in court, but in default, finds that a foreclosure is proper, and orders the land to be sold, it must, though personal judgment is given against only one, and his right of redemption alone is cut off, be held good to some extent, at least, as against all of the defendants, in a proceeding which expressly ignores or denies its existence, but which is not a direct attack upon it. (*Day v. Goodwin*, 465.)

11. MORTGAGES—FORECLOSURE—EXTINGUISHMENT OF LIEN.—If a mortgage given upon one tract of land to secure a debt due and payable as an entirety, is, under the power contained in the mortgage, foreclosed upon default in payment for less than the amount due, the lien of the mortgage is thereby extinguished. Under such mortgage, there can be but one foreclosure, and that exhausts the mortgage, which is no longer security for any part of the debt. (*Loomis v. Clambey*, 576.)

12. EXECUTION SALE—WHEN RELATES TO THE DATE OF A MORTGAGE.—If a judgment is recovered upon a bond secured by a mortgage, and a fieri facias is issued and a sale made thereunder of the mortgaged premises, the title relates to the date of the mortgage, and hence divests the title of grantees of the mortgagor subsequent to its execution, though such grantees were not parties to the action. (*Morris v. Campbell*, 880.)

See Crops; Deeds, 9; Husband and Wife, 1; Insurance, 60; Mechanic's Lien, 8, 9.

MUNICIPAL CORPORATIONS.

1. MUNICIPAL CORPORATIONS HAVE SUCH CAPACITIES and powers, and such only, as are expressly granted, and such as may be implied as essential to carry into effect those expressly granted. All doubtful claims to power are resolved against the corporation. (*Markley v. Mineral City*, 776.)

2. MUNICIPAL CORPORATIONS—POWER TO ACQUIRE LAND FOR DONATION PURPOSES.—A municipal corporation has no power, by deed of purchase, to legally acquire title to, and hold real estate for, the sole purpose and with the sole intent of donating it to persons or corporations to procure the construction and operation of manufacturing plants within the municipality. (*Markley v. Mineral City*, 776.)

3. MUNICIPAL CORPORATIONS—POWER TO ACQUIRE LAND FOR DONATION PURPOSES.—If a municipality pays out its corporate funds for the purchase of land to be donated by it to a person or corporation as an inducement to build and operate manufacturing plants within the corporate limits, the money is unlawfully expended, and the deed taken by the city purporting to convey such land is void. (*Markley v. Mineral City*, 776.)

4. MUNICIPAL CORPORATIONS—POWER TO ACQUIRE LAND FOR DONATION PURPOSES—RIGHT TO RECONVEYANCE.—If a municipality has purchased lands with its corporate funds, and has donated it to a person as an inducement for him to

construct and operate manufacturing plants within the municipality it is not entitled to maintain an action in a court of equity to compel a reconveyance of the land to it with possession, together with a cancellation of its own conveyance. In such case, the court will not aid either party, but will leave them where they have placed themselves. (*Markley v. Mineral City*, 776.)

5. **STREETS—PARTIAL OCCUPANCY AND USE OF.**—The fact that a street was never worked or fitted for travel clear to the south line thereof does not prevent the municipality from working and fitting it for travel up to such line whenever it may choose. (*Madison v. Mayers*, 127.)

6. **STREETS—MUNICIPAL CORPORATIONS, RIGHT TO IN.** A city has a right to maintain a suit to prevent an abutting property owner from removing stone, earth, and other materials from within the limits of a street and from impairing an embankment situated therein, or from making it more difficult or expensive to fit the whole width of the street for travel. (*Madison v. Mayers*, 127.)

7. **MUNICIPAL CORPORATIONS—SIDEWALK AS A PART OF THE STREET—AUTHORITY OF CITY.**—A sidewalk is a part of the street, and the authority of a city over a street extends over the sidewalk as a part of the street. (*Frankfort v. Coleman*, 412.)

8. **MUNICIPAL CORPORATIONS—RIGHT TO FORBID THE FILLING IN OF A LAKE.**—Though a city has been given power to enact ordinances for the benefit of trade, commerce, and health, and to provide for the abatement and removal of nuisances, it is not thereby authorized to restrain the filling in of a lake not constituting any part of the public street. (*Madison v. Mayers*, 127.)

9. **MUNICIPAL CORPORATION—SIDEWALKS—PROPERTY OWNER'S LIABILITY.**—A municipal corporation may, upon proper notice, require an abutting property owner to construct a sufficient sidewalk in front of his premises, and, upon his failure to do so, may itself construct such walk and assess the cost thereof against his property, but it cannot recover indemnity from him for money paid out on a judgment against it for injury caused by his negligent construction of the sidewalk. (*Wilhelm v. Defiance*, 745.)

10. **MUNICIPAL CORPORATIONS—NUISANCES—DUTY TO SUPPRESS.**—The duty of the peace officers of a city to suppress a public nuisance maintained therein is a public, as distinguished from a strictly corporate duty, and the failure of such officers to perform such duty does not render the municipality liable therefor. (*Mayor etc. of Wilmington v. Vandergrift*, 256.)

11. **MUNICIPAL CORPORATIONS—ORDINANCES TO PREVENT NUISANCES.**—Town authorities have authority to prohibit by ordinance the keeping of hogpens in the town to such an extent as they may deem necessary to prevent nuisances to the public, and they are the sole judges of the limits to be prescribed, unless such ordinance is clearly unreasonable. (*State v. Hord*, 743.)

12. **MUNICIPAL CORPORATIONS—ORDINANCE TO PREVENT NUISANCES—DISCRIMINATION.**—A municipal ordinance forbidding any citizen in a town from keeping hogpens within one hundred yards of the residence of another is reasonable and valid and not void as making unjust discrimination. (*State v. Hord*, 743.)

13. **MUNICIPAL CORPORATIONS—NUISANCE—ORDINANCE UNNECESSARY.**—If an act is a public nuisance at common law, the failure of the city in which such act is committed to legislate upon it or to forbid it is not a neglect of duty. (*Mayor etc. of Wilmington v. Vandergrift*, 256.)

14. **MUNICIPAL CORPORATIONS—NUISANCE—COASTING—LIABILITY FOR.**—Coasting on the public street of a city in such

manner as to imperil the safety of pedestrians thereon is a public nuisance, independently of municipal ordinances. (Mayor etc. of Wilmington v. Vandergrift, 256.)

15. MUNICIPAL CORPORATIONS—PUBLIC NUISANCES OR PURPRESTURES.—A municipal corporation, within whose limits is a lake, has no more right to remove, or to compel the removal of, a purpresture or public nuisance therein than has a private individual. Its removal can be compelled only by some proceeding instituted by the state. (Madison v. Mayers, 127.)

16. MUNICIPAL CORPORATIONS—UNLAWFUL CHANGE OF A PUBLIC USE—WHAT IS.—If land is conveyed to a municipal corporation to be held only as an ornamental park, it has no right to erect a schoolhouse thereon. (Rowzee v. Pierce, 625.)

17. MUNICIPAL CORPORATIONS—TITLE OF TO LANDS CONVEYED FOR A PUBLIC USE.—Where land is conveyed to a municipal corporation to be held only for public use as an ornamental park, subject to such regulations as it may make for fencing and ornamenting the same, keeping it in good order and preventing nuisances, it does not acquire an absolute title, and has no right to convey the land nor to put it to any use not consistent with that specified in the deed. (Rowzee v. Pierce, 625.)

18. IF A MUNICIPAL CORPORATION ABANDONS A USE FOR WHICH PROPERTY WAS CONVEYED to it, it does not thereby acquire a right to devote it to some other and inconsistent use. On the contrary, the property reverts to the original donors. (Rowzee v. Pierce, 625.)

19. MUNICIPAL CORPORATIONS—DUTY OF, TO KEEP STREETS IN REPAIR, WHETHER IMPROVED OR NOT.—If a street within the limits of a city, whether improved or not, is in common use by the public, it is the duty of the city to keep it in a reasonably safe condition for ordinary travel. (Frankfort v. Coleman, 412.)

20. MUNICIPAL CORPORATIONS—DUTY OF, TO KEEP IN REPAIR A HIGHWAY BROUGHT WITHIN THE CORPORATE LIMITS.—If a city brings a highway within its corporate limits and leaves it open for public travel, the city is bound to keep it in a reasonably safe condition for travel, whether the road was laid out and opened by the board of county commissioners, or had become a public highway by user. (Frankfort v. Coleman, 412.)

21. MUNICIPAL CORPORATIONS—NOTICE OF DEFECT IN STREET.—Actual notice, on the part of a city, of a defect in a street or sidewalk, is not necessary, if the defect has existed for such a time that, with reasonable diligence, it might have been known. (Frankfort v. Coleman, 412.)

22. MUNICIPAL CORPORATIONS—SIDEWALKS—LIABILITY OF PROPERTY OWNER.—If a municipality accepts a sidewalk constructed by the owner of abutting property, pursuant to its notice, and in compliance therewith, all liability for mere negligence in construction and maintenance must rest and remain upon the city. (Wilhelm v. Defiance, 745.)

23. MUNICIPAL CORPORATIONS—INJURY CAUSED BY DEFECT IN STREET—CONTRIBUTORY NEGLIGENCE.—Although a person injured by reason of a defect in a street had knowledge of such defect, that fact would not, of itself, deprive him of his right of action; but such knowledge, with all the other facts, is to be considered by the jury in determining whether he was guilty of contributory negligence. (Frankfort v. Coleman, 412.)

24. MUNICIPAL CORPORATIONS—RIGHT OF OWNER TO BRING HIS LOT TO GRADE—SURFACE WATER.—The owner of

a lot in a city may exercise his right to bring it to grade, although he changes the flow of surface water thereon to lots owned by other persons. (Cedar Falls v. Hansen, 439.)

25. MUNICIPAL CORPORATIONS — ESTOPPEL OF LOT-OWNER TO CHANGE FLOW OF SURFACE WATER—GRADING.—If a city constructs a ditch, which conveys water over a lot therein, the owner thereof does not, by acquiescing in such construction, estop himself from obstructing the flow of water in the ditch by raising his lot to grade. (Cedar Falls v. Hansen, 439.)

26. MUNICIPAL CORPORATIONS—PLEADINGS.—In an action against a city, an averment that the accident complained of was the result of a willful disregard of corporate duty is more in the nature of a conclusion of law than a bare statement of fact, and a demurrant is concluded by the admissions made by demurrer, only so far as such averment is sustained or supported by the law of its being, and the principles which underlie the duties and liabilities of municipal corporations. (Mayor etc. of Wilmington v. Vandergrift, 256.)

27. MUNICIPAL CORPORATIONS—PLEADINGS—CHARTER AND ORDINANCES AS PART OF.—In an action against a municipal corporation to recover for injury received by reason of the willful negligence of the city in permitting obstructions to remain in its streets amounting to a nuisance, the municipal ordinances and charter are as much the legitimate subjects of inquiry as if literally incorporated in the pleadings, and this is so notwithstanding the allegation of actionable negligence and admissions made by demurrer. (Mayor etc. of Wilmington v. Vandergrift, 256.)

28. MUNICIPAL CORPORATIONS—INJURY CAUSED BY DEFECT IN STREET—COMPLAINT, WHEN SUFFICIENT.—A complaint against a city for a personal injury caused by a defect in a street states a good cause of action where it appears from the complaint that the plaintiff was injured at a place upon a public street of the city; that the city had notice of the defective condition of the street; that the place where the injury occurred was within the corporate limits of the city, and that such place was one which it was the city's duty to keep in repair. (Frankfort v. Coleman, 412.)

29. MUNICIPAL CORPORATIONS—INJURY CAUSED BY DEFECT IN STREET—COMPLAINT, WHEN SUFFICIENT.—A complaint against a city for a personal injury caused by a defect in a street states a good cause of action where it is alleged that the plaintiff, while walking home on a public street of the city, used by the public generally, stepped into one of a number of holes and excavations in the street, without fault on his part, and was injured; that such holes and excavations were dug more than sixty days prior to the injury; that the city had notice of them at the time they were dug and that it negligently and carelessly allowed them to remain; but that the plaintiff had no knowledge of their existence. (Frankfort v. Coleman, 412.)

See Ejectment, 1.

MUTUAL BENEFIT SOCIETIES.

See Insurance.

NEGLIGENCE.

1. NEGLIGENCE—ILLITERACY—CONTENTS OR LEGAL EFFECT OF WRITING.—An illiterate party is not negligent in signing a contract without informing himself as to its contents or legal effect, where he relies upon the other party to properly express the terms of their oral agreement in a writing, and upon the

latter's representation that he has done so. (*Williams v. Hamilton*, 475.)

2. **NEGLIGENCE—FINDING OF PROXIMATE CAUSE.**—A verdict that the defendant was guilty of negligence which caused the injury is not sufficient. It must further find that such negligence is the proximate cause of such injury. (*Maitland v. Gilbert Paper Co.*, 137.)

3. **NEGLIGENCE—LIABILITY FOR, WHEN EXISTS.**—There can be no recovery for negligence unless the injury complained of was the natural and probable result of it, and the attendant circumstances were such that a person of ordinary care ought reasonably to have apprehended that the injury might result from the negligence. (*Maitland v. Gilbert Paper Co.*, 137.)

4. **NEGLIGENCE—DEATH BY NEGLIGENCE OR WRONGFUL ACT.**—A RIGHT OF ACTION FOR DAMAGES resulting from death through negligence or wrongful act does not exist unless it is expressly given by statute, as no such right is given by the common law. (*Hindry v. Holt*, 235.)

5. **NEGLIGENCE—DEATH BY NEGLIGENCE OR WRONGFUL ACT—RIGHT OF ACTION—FATHER AND MOTHER.**—Under a statute giving a right of action, for damages resulting from death caused by negligence or wrongful act, to the father and mother of the deceased, or to the surviving parent, they have the exclusive right of action where the deceased had never been married and left no children. (*Hindry v. Holt*, 235.)

6. **NEGLIGENCE—DEATH BY NEGLIGENCE OR WRONGFUL ACT—RIGHT OF ACTION—NIECE.**—If an unmarried man, who supports the child of a deceased brother, is killed by negligence or wrongful act, the child, though left as the decedent's only heir, has no right of action for damages under a statute limiting the right to sue, in such cases, to lineal descendants of the deceased. (*Hindry v. Holt*, 235.)

7. **NEGLIGENCE—DEATH BY NEGLIGENCE OR WRONGFUL ACT—RIGHT OF ACTION—CONSTRUCTION OF WORDS "HEIR OR HEIRS" IN STATUTE.**—In the Colorado statute, which gives a right of action for damages resulting from death through negligence or wrongful act, designates the parties who may sue, and provides that the "heir or heirs" of the deceased may sue, if there is no husband or wife, or if he or she fails to sue within one year after the death, the words "heir or heirs" mean "child or children," and do not include all those entitled to share in the estate of a person dying intestate. The right of action is, therefore, limited to lineal descendants. (*Hindry v. Holt*, 235.)

See Banks and Banking, 7; Carriers, 5; Corporations, 11, 12, 14, 15; Railroad Companies.

NEGOTIABLE INSTRUMENTS.

1. **NEGOTIABLE INSTRUMENTS.**—Every indorsement of a promissory note, whether for accommodation or otherwise, is essentially a new contract, independent of the contract obligations of the maker. (*Maddox v. Duncan*, 678.)

2. **ONE WHO TAKES A COLLATERAL SECURITY FOR A PRE-EXISTING INDEBTEDNESS** must be regarded as a holder for value. (*Russ Lumber etc. Co. v. Muscupiabe Land etc. Co.*, 186.)

3. **NEGOTIABLE INSTRUMENTS—SURETY OR INDORSER.** A payee of a note who indorsed thereon a waiver of notice, protest, and demand and an assignment of the note as a guaranty of payment is not a surety, but an indorser. (*Maddox v. Duncan*, 678.)

4. NEGOTIABLE INSTRUMENTS.—An indorsee of a negotiable promissory note for value, in good faith, and before maturity, cannot be affected by a subsequent breach of the contract made by the payee and constituting the consideration of the note. (*Russ Lumber etc. Co. v. Muscupiabe Land etc. Co.*, 186.)

5. NEGOTIABLE INSTRUMENTS—RESCISSION CANNOT AFFECT THE INDORSEE.—Though the maker of a negotiable promissory note becomes entitled to rescind, he cannot exercise his right to the prejudice of an indorsee who has received the notes in the usual course of business, in good faith, for value, and without notice of the facts upon which the right to rescind is founded. (*Russ Lumber etc. Co. v. Muscupiabe Land etc. Co.*, 186.)

6. RESCISSION—OFFER TO SURRENDER—WHEN NOT NECESSARY.—If negotiable promissory notes are given in consideration of an agreement to furnish water for irrigation, and such agreement is pledged as collateral security for the payment of such notes, and after their transfer the original payee is unable to perform his agreement, there is a failure of consideration, and it is not necessary for the maker of the notes to offer to release the payee from the agreement as a condition precedent to the right to rescind or to defend against the notes for failure of consideration. (*Russ Lumber etc. Co. v. Muscupiabe Land etc. Co.*, 186.)

7. CONSIDERATION—FAILURE OF OCCURRING AFTER THE TRANSFER OF PROMISSORY NOTES.—Where promissory notes are given in consideration of an agreement that the payee will thereafter perform certain conditions, and he is, when demanded, unable to comply, or refuses to comply, with such conditions, there is a failure of the consideration upon which the notes were executed. (*Russ Lumber etc. Co. v. Muscupiabe Land etc. Co.*, 186.)

8. CONSIDERATION.—A FAILURE of consideration, either total or partial, may be pleaded as a defense to an action upon a promissory note either wholly or in pro tanto. (*Russ Lumber etc. Co. v. Muscupiabe Land etc. Co.*, 186.)

See Judgment, 33; Limitations of Actions, 5.

NEW TRIAL.

PRACTICE.—A MOTION FOR A NEW TRIAL IS NOT an appropriate proceeding to review the action of a court in taking judgment when there has been no trial upon an issue of fact, as where the answer of the defendant has been struck out, and judgment entered against him as for want of an answer. (*Foley v. Foley*, 147.)

NOTARIES PUBLIC.

1. NOTARIES PUBLIC.—THE POWER TO ADMINISTER OATHS is not one of the common-law powers of a notary, but is conferred only by legislative enactment. (*Teutonia Loan etc. Co. v. Turrell*, 419.)

2. NOTARIES PUBLIC—TAKING OF AFFIDAVITS—PRESUMPTION—JURISDICTION.—The presumption is, that a notary public, in taking an affidavit, acted within his jurisdiction, and administered the oath where he had a right to administer it. (*Teutonia Loan etc. Co. v. Turrell*, 419.)

3. NOTARIES PUBLIC—TAKING OF AFFIDAVITS—PRESUMPTION—JURISDICTION.—If an affidavit, in its caption, purports to have been made in this state, but the notary, in his certificate, designates his jurisdiction as within another state, the presumption is controlling that the officer took the affidavit in such other state. (*Teutonia Loan etc. Co. v. Turrell*, 419.)

See Evidence, 1; Officers, 1.

NUISANCE.

1. **NUISANCES ARE INJURIES TO THE PUBLIC** or to others, and not injuries or annoyances which a person causes to himself and family. (State v. Hord, 743.)

2. **NUISANCE—NATURAL ACCUMULATION OF WATER.**—If a pond of water accumulates upon land, from natural causes, in such quantities that, in process of evaporation, noxious and deleterious gases are emitted, injurious to the public health and to the health of persons residing in the vicinity, the owner cannot be held answerable for creating or maintaining a nuisance, nor compelled to abate the pond as such, when he has not, by his own act or negligence, contributed to bring about the alleged nuisance. (Roberts v. Harrison, 342.)

See Municipal Corporations, 10-15.

NUNC PRO TUNC ORDERS.

See Judgment, 7.

OFFICERS.

1. **NOTARIES PUBLIC ARE PUBLIC OFFICERS.** (Teutonia Loan etc. Co. v. Turrell, 419.)

2. **OFFICERS—ELIGIBILITY OF WOMEN TO OFFICE.**—A notary is an officer, and a woman is ineligible to hold such office, under constitutional provisions requiring an officer to be an elector, and an elector to be a male citizen. (State v. Adams, 792.)

3. **OFFICERS—POWER TO REMOVE.**—Power conferred upon a mayor to remove from office "for neglect of duty or misconduct in office," is a special power and must be strictly construed. It cannot be exercised arbitrarily, nor until substantial charges have been preferred, which, in judgment of law, embody facts involving neglect of duty or misconduct in office, and of which the accused has had due notice and against which he has had an opportunity to be heard. (State v. Sullivan, 781.)

4. **OFFICERS—REMOVAL FROM OFFICE—FINDINGS.**—Under power vested in a mayor to remove from office for "neglect of duty or misconduct in office," the findings and order of the mayor removing an accused officer from office must be so definite as to show on their face that the power has been exercised according to law, and in what the neglect of duty charged consisted. (State v. Sullivan, 781.)

5. **OFFICERS—REMOVAL FROM OFFICE—INSUFFICIENT CHARGES AND FINDINGS.**—If power is vested in a mayor to remove from office "for neglect of duty or misconduct in office," and another statute imposes upon a board of equalization the duty to equalize returns of personalty only, a charge preferred against such board, alleging that it has knowingly consented to an undervaluation of real and personal property in gross, without alleging any undervaluation of the personalty alone, is not sufficiently definite to support a finding of neglect of duty and removal from office. (State v. Sullivan, 781.)

ORIGINAL PACKAGE.

See Interstate Commerce, 5.

PARENT AND CHILD.

See Adoption, 1; Adverse Possession, 1-3; Deeds, 3; Schools, 1, 2.

PARTIES.

See Attachment, 10; Judgment, 19; Pleading, 3-5.

PARTITION.

1. A PARTITION UNDER THE INTESTATE LAWS MUST INCLUDE ALL the realty of which the parties are seised as cotenants. (Deshong v. Deshong, 855.)

2. PARTITION OF ESTATES IN REMAINDER cannot be compelled unless specially authorized by statute. In Pennsylvania, however, an act of the legislature provides that a partition may be had notwithstanding there may be a life estate in a part of the property with remainders in fee subject to the rights of the life tenants. (Deshong v. Deshong, 855.)

PARTNERSHIP.

1. PARTNERSHIP—ONE PARTNER MAY SUE ANOTHER AT LAW ON A PROMISSORY NOTE executed by the partnership to him, where there is a statute providing that all contracts which by the common law are joint shall be construed as joint and several, and that in all cases of joint obligations of copartners and others, suits may be prosecuted against any one or more of them who are liable. (Willis v. Barron, 672.)

2. PARTNERSHIP—POWER OF PARTNER TO BIND FIRM. A purchase of goods by one partner in the name of the firm in quantities so large as to be entirely beyond the needs of the partnership, and for speculative purposes, though the goods be of the general character dealt in by the partnership, is beyond the scope of the partnership business and does not bind the firm, unless an acquiescence in such act is proven, either directly or indirectly, by the usual course of dealing. Such purchase does not bind the firm, when the other members thereof repudiate the transaction as soon as it comes to their knowledge. (Maurin v. Lyon, 568.)

3. PARTNERSHIP—COUNTERCLAIM.—Where a person is sued as copartner on a promissory note executed by the firm, an unsettled partnership claim cannot be pleaded as a counterclaim, and is not any defense to the action. (Willis v. Barron, 672.)

See Attorney and Client, 3; Corporations, 10.

PEDDLERS.

See Constitutional Law, 1; Statutes, 7.

PERPETUITIES.

See Charities, 10.

PLEADING.

1. PRACTICE.—A pleading cannot be rejected or struck out as sham when it does not plainly appear to be false, where the conclusion that it is false can be reached only by weighing and balancing the probabilities arising from certain physical facts. (Pittsburgh etc. R. R. Co. v. Frazee, 377.)

2. PLEADING—STRIKING OUT OF ANSWER—WHEN PROPER.—A motion to strike out an answer will be granted if its allegations are, in substance, the same as those of former answers, to which demurrers have been sustained, although it contains a statement that all former and amended answers are withdrawn. (Hoyt v. Beach, 461.)

3. ABATEMENT, PLEA IN.—A DEFECT OF PARTIES PLAINTIFF can be urged only by a plea in abatement, where such defect is not apparent on the face of the complaint. (Sheridan Gas etc. Co. v. Pearson, 402.)

4. PARTIES PLAINTIFF—DEFECT—WAIVER OF OBJECTION.—An objection that there is a defect of parties plaintiff is deemed to have been waived where no plea in abatement was interposed. (*Sheridan Gas etc. Co. v. Pearson*, 402.)

5. PRACTICE.—THE OBJECTION THAT THE PLAINTIFF HAS NOT LEGAL CAPACITY to sue, if not taken by answer or demurrer, is waived. (*Meyer v. Barth*, 124.)

6. PRACTICE.—If a motion, taken as a whole, is not sustainable, the court is justified in denying it, though the moving party is entitled to a part of the relief sought. (*Baum v. Thoms*, 368.)

7. CRIMINAL LAW—ARRAIGNMENT—PLEA.—If a defendant is arraigned before a justice of the peace and pleads not guilty, it is not necessary for him, on appeal to a county court, to be re-arraigned, or to replead in that court. (*Poole v. People*, 245.)

See Corporations, 16-18; Eminent Domain, 4; Evidence, 2; Marriage and Divorce, 4; Municipal Corporations, 26-29.

POLICE POWER.

CONSTITUTIONAL LAW—RIGHT TO REGULATE PLUMBING BUSINESS.—A statute which provides that no person shall engage in the business of plumbing unless he shall have passed an examination as to his competency and qualifications, and procured a license, and providing a penalty for a violation, does not infringe in any sense the constitutional rights of the workman, and is but the ordinary exercise of the police power of the state. (*State v. Gardner*, 785.)

See Interstate Commerce, 6.

POWERS.

POWER COUPLED WITH AN INTEREST.—If a power is coupled with an interest, it survives the person giving it, and may be executed after his death. (*Carter v. Slocomb*, 714.)

See Mortgage, 1, 2.

PRESCRIPTION.

See Adverse Possession; Ejectment; Waters, 1.

PRESUMPTIONS.

See Appeal, 20; Evidence, 6, 7; Husband and Wife, 1; Notaries Public, 2, 3; Process, 2; Railroad Companies, 5.

PRIVILEGED COMMUNICATIONS.

See Attorney and Client, 4, 5.

PROCESS.

1. A SUMMONS is issued when it is put out of the clerk's office under his sanction and authority, and given to an officer for the purpose of being served. (*Houston v. Thornton*, 699.)

2. SUMMONS.—THE PRESUMPTION THAT A SUMMONS WAS ISSUED on the day it bears date is not rebutted by the fact that the sheriff's indorsement of its receipt by him bears a later date. (*Houston v. Thornton*, 699.)

3. PROCESS—SERVICE UPON NONRESIDENTS.—If a justice of the peace issues process for defendants residing outside the county, it must be issued or addressed to an officer of the county where it is to be served. (*Durham Fertilizer Co. v. Marshburn*, 708.)

4. PROCESS—EXEMPTION FROM SERVICE OF NONRESIDENTS.—Summons or other civil process cannot be served upon a non-resident who comes into the state for the sole purpose of attending a litigation in the courts of that state as a suitor or a witness. (Cooper v. Wyman, 731.)

5. PROCESS—EXEMPTION FROM SERVICE OF—TIME COVERED.—NON-RESIDENTS who come into the state for the purpose of attending its courts either as suitors or witnesses are exempt from the service of civil process from the time of their coming, and until they have had reasonable time for returning. (Cooper v. Wyman, 731.)

6. PROCESS—EXEMPTION FROM SERVICE OF—NONRESIDENTS' REMEDY.—Service of civil process upon a non-resident suitor or witness while attending the courts of the state as such suitor or witness is not void but voidable. His remedy is not by motion to dismiss the action, but by motion on special appearance to set aside the return of the service. If the motion is denied the ruling may be reviewed on appeal. (Cooper v. Wyman, 731.)

7. PROCESS—MALICIOUS ABUSE OF.—Process must have been used to accomplish some unlawful end, or to compel the party against whom it has issued to do some collateral thing which he could not legally be compelled to do, in order to support an action for malicious abuse of process. (Docter v. Riedel, 40.)

8. PROCESS—MALICIOUS ABUSE OF.—If a creditor, knowing that his debtor is able and will pay a judgment note on demand, without making such demand enters judgment on the note at 10 o'clock at night, and immediately issues execution and levies it by forcibly breaking into the debtor's store, with intent to injure his business and credit, the creditor is not liable to an action for malicious abuse of process. (Docter v. Riedel, 40.)

See Actions, 4.

PROHIBITION.

CONTEMPT OF COURT—PROHIBITION AS A REMEDY.—If the matters charged do not constitute a contempt of court, and it appears that immediate imprisonment is threatened, a writ of prohibition affords an adequate remedy. The accused is not obliged to wait until sentenced or imprisoned and to seek relief by habeas corpus, writ of error, or certiorari. (State v. Circuit Court, 90.)

PROXIMATE CAUSE.

See Negligence, 2; Railroad Companies 8.

PURCHASE.

See Deeds, 6, 7.

RAILROAD COMPANIES.

1. RAILROADS—PASSENGERS—DUTY TO STOP AT STATION NOT SCHEDULED.—A passenger, whether with or without a ticket, must ascertain before boarding a railroad train whether it stops at the station of his destination. If he fails to do so, the railroad company is under no obligation to stop at such station, contrary to its published schedule. (Schiffler v. Chicago etc. Ry. Co., 35.)

2. RAILROADS—CONTRIBUTORY NEGLIGENCE OF PASSENGER.—A boy, seventeen years of age, of ordinary intelligence, who has made previous railroad journeys alone, must be held to assume the risk of jumping from a moving train at a station at which the train is not scheduled to stop, although the conductor promised

to slow up the train for him and he jumped under the impression that the promise was being kept. (*Schiffler v. Chicago etc. Ry. Co.*, 85.)

3. **NEGLIGENCE—PROXIMATE CAUSE.**—The act of a passenger in jumping from a train while it is in rapid motion is neither the natural nor the probable consequence of a failure to stop the train according to promise. Hence, such failure is not the proximate cause of injury to the passenger arising from the jump. (*Schiffler v. Chicago etc. Ry. Co.*, 35.)

4. **RAILWAYS—CROSSINGS—DUTY OF TRAVELERS AT.**—In attempting to cross a railway track, a traveler must listen for signals, notice signs put up as warnings, and look attentively up and down the track. If a traveler, by looking, could have seen an approaching train in time to escape, it will be presumed, in case he is injured by a collision, either that he did not look, or, if he did look, that he did not heed what he saw. (*Pittsburgh etc. R. R. Co. v. Frazee*, 377.)

5. **RAILWAYS—PRESUMPTION RESPECTING A PERSON INJURED WHILE CROSSING.**—When a person crossing a railway track is injured by collision with a train, the fault is *prima facie* his own, and he must show affirmatively that his fault or negligence did not contribute to the injury, before he is entitled to recover therefor. (*Pittsburgh etc. R. R. Co. v. Frazee*, 377.)

6. **RAILWAY CROSSINGS.**—The testimony of the plaintiff injured at a railway crossing by collision with a train that he looked and listened is not sufficient to support a verdict in his favor if the physical facts are such that if he did look and listen attentively, he must have heard or seen the approaching train in time to escape injury therefrom. (*Pittsburgh etc. R. R. Co. v. Frazee*, 377.)

7. **RAILROAD COMPANIES — SELF-COUPPLERS — NEGLIGENCE.**—The failure of a railway company to equip its freight-cars with self-coupling devices is negligence *per se*, for which it is liable in damages to an employé who receives an injury while coupling cars by hand, whether he is guilty of contributory negligence or not. (*Greenlee v. Southern Ry. Co.*, 734.)

8. **RAILROAD COMPANIES — SELF-COUPPLERS — NEGLIGENCE—ASSUMPTION OF RISK.**—Although an employé remains in the service of a railway company, knowing that its cars are not equipped with self-couplers, as required by law, it is liable to him for an injury received while coupling its cars by hand. (*Greenlee v. Southern Ry. Co.*, 734.)

9. **RAILROADS—POWER OF CONDUCTOR.**—It is not within the apparent power of the conductor of a railway passenger train to bind the company by a promise to change the published schedule of stops to be made by his train. (*Schiffler v. Chicago etc. Ry. Co.*, 85.)

RATIFICATION.

See Equity, 7; Judgment, 9.

RECEIVERS.

1. **A RECEIVER OF A RAILROAD IS NOT AN AGENT OF EITHER PARTY** to the suit, and neither is responsible for his contracts or for his misfeasance or nonfeasance of his office. The liabilities incurred by him are, strictly speaking, the liabilities of the court appointing him. (*Farmers' Loan Co. v. Oregon Pac. R. R. Co.*, 822.)

2. **RECEIVER—LIABILITY OF PLAINTIFF FOR COSTS AND EXPENSES OF.**—A plaintiff who commences suit to foreclose a mortgage on a railway, in which a receiver is subsequently ap-

pointed, is not liable for wages or other obligations incurred by such receiver, though the proceeds of the property prove insufficient to pay the same. (*Farmers' Loan Co. v. Oregon Pac. R. R. Co.*, 822.)

REFORMATION OF INSTRUMENTS.

See Equity, 4-7; Executions, 6.

RELEASE.

1. A RELEASE OF A CLAIM FOR DAMAGES for personal injuries cannot be avoided on the ground that it subsequently appears that they were more serious than apprehended at the time of the settlement. (*Kane v. Chester Traction Co.*, 846.)

2. RELEASE OF CLAIM FOR DAMAGES—ATTEMPT TO AVOID FOR FRAUD IN ITS PROCUREMENT.—One having a claim of damages for personal injuries received through the negligence of a railway corporation, which he is induced to settle for an amount much less than claimed, cannot avoid such settlement on the ground that it was procured by the false representations of an agent of the corporation that if he went to law he would get nothing, because the judge was a stockholder in the corporation, and it would buy up the jury, the witnesses, and even the claimant's own attorneys. (*Kane v. Chester Traction Co.*, 846.)

RENTS AND PROFITS.

See Ejectment, 2.

REPLEVIN.

REPLEVIN.—A JUDGMENT IN FAVOR OF THE DEFENDANT IN REPLEVIN who has given bond and retained possession of the property is not in the alternative, because he is already in possession. (*Cox v. Martin*, 604.)

See Sheriffs; Shipping, 2.

RIPARIAN RIGHTS.

See Waters.

RUBBER STAMP SIGNATURE.

See Banks and Banking, 4, 5.

RULES OF COURT.

See Appeal, 19.

SALVATION ARMY.

See Charities, 8.

SCHOOLS.

1. SCHOOLS—EXCLUSION OF CHILD FOR PARENT'S MISCONDUCT.—If a parent, whether father or mother, goes to the schoolroom of a lawfully established public school; and, in the presence of his or her children and other pupils publicly calls into question the justice or correctness of a decision of the teacher in a matter of discipline relating to such children; uses offensive and insulting language to such teacher, acts in such a manner as to interrupt the exercises of the school, and conducts himself or herself in such manner as to bring the teacher and the discipline of the school into contempt in the eyes of the pupils, it is the duty of the authorities of such school to exclude from the schoolroom the child or children of such parent, although the child thus excluded has

not been guilty of a violation of any rule of the school. (Board of Education v. Purse, 312.)

2. SCHOOLS—EXCLUSION OF CHILD FOR MISCONDUCT OF PARENT.—The board of education, either in the absence of a rule, or in furtherance of a prescribed rule, has the right to exclude from a public school under its control any child whose parent, whether father or mother, in the schoolroom or its vicinity, in the presence of such child and other pupils, conducts himself or herself in such manner that his or her acts are calculated to produce disorder in the school and break down and destroy its discipline, although the child thus excluded has not violated any rule of the school. (Board of Education v. Purse, 312.)

SEDUCTION.

SEDUCTION—WILLINGNESS TO MARRY AS A DEFENSE.—One who, under promise of marriage, seduces an unmarried woman of previous chaste character, is not entitled to be acquitted of his crime on proving his willingness to marry her at all times prior to the filing of the information or indictment against him. She is not compelled to condone his offense by marrying him, though if she did so, he would be freed from the penalty of the law. (People v. Hough, 201.)

SELF-COUPERS.

See Railroad Companies, 7, 8.

SERVITUDE.

See Highways, 2.

SHELLEY'S CASE.

See Wills, 4.

SHERIFFS.

SHERIFF—EXPIRATION OF TERM.—When a sheriff, by virtue of his office, acts as administrator of a decedent, his right to so act terminates with his term of office, and if in his official capacity he has brought an action of replevin, his successor in office may be substituted in his place as plaintiff. (Cox v. Martin, 604.)

SHIPPING.

1. SHIPPING—LIEN FOR FREIGHT—JURISDICTION.—A shipowner, as a common carrier, has a particular and specific lien at common law for his freight upon the goods carried, which he may enforce in a state court. (Warehouse etc. Supply Co. v. Galvin, 57.)

2. SHIPPING—REPLEVIN—LIEN FOR FREIGHT—JURISDICTION.—Replevin by the owner, and consignee of goods shipped, by water, to recover possession thereof from the owner of the ship who claims a lien thereon growing out of the contract of carriage, is an action to enforce a common-law remedy, and not a proceeding in admiralty, and may be prosecuted in the state courts. (Warehouse etc. Supply Co. v. Galvin, 57.)

See Admiralty.

SPECIFIC PERFORMANCE.

SPECIFIC PERFORMANCE OF A CONTRACT TO SUPPLY NATURAL GAS may be decreed by a court of equity. (Connaugh Gas Co. v. Jackson Farm Gas Co., 865.)

See Contracts, 14.

SPENDTHRIFT TRUSTS.

See Trusts, 7.

STATUTE OF FRAUDS.

See Contracts; Wills, 2.

STATUTE OF LIMITATIONS.

See Limitations of Actions.

STATUTE.

1. STATUTES — OPERATION OF MUST BE PROSPECTIVE.—Where there is a statute imposing a succession tax enacted before the death of the decedent and another enacted afterward, the former controls. (State v. Switzler, 653.)

2. STATUTES ADOPTED FROM ANOTHER STATE—CONSTRUCTION.—In adopting a statute of a sister state, it is taken with the construction theretofore put upon it by the courts of that state, but this rule does not apply to a construction put upon the statute by the courts of that state since its adoption in this state. (Germania Life Ins. Co. v. Lewin, 215.)

3. CONSTITUTIONAL LAW—CLASS LEGISLATION.—LAWS UNDERTAKING TO REGULATE BUSINESS must, in all their requirements, operate equally upon all engaged in such business, in order to be valid. (State v. Gardner, 785.)

4. CONSTITUTIONAL LAW—CLASS LEGISLATION.—A statute is unconstitutional and void if it operates unequally, in that it imposes the burden of an examination and license fee upon certain persons, and exempts others of the same class pursuing the same business under similar circumstances. (State v. Gardner, 785.)

5. CONSTITUTIONAL LAW—CLASS LEGISLATION.—A statute which imposes special restrictions or burdens, or grants special privileges to persons engaged in the same business under similar circumstances, cannot have a uniform operation and is void, because it is in contravention of the equal right guaranteed to all in the enforcement of laws and in the enjoyment of liberty and of an equal right in the acquisition and possession of property. (State v. Gardner, 785.)

6. CONSTITUTIONAL LAW—CLASS LEGISLATION—REGULATION OF PLUMBING.—A statute requiring all who engage in the business of plumbing, whether master, or employing plumber, or journeyman, to first pass an examination as to fitness and procure a license, but providing that in case of a firm, or corporation, the examination and licensing of any one member of such firm, or the manager of the corporation, shall satisfy the requirements of the act, thus permitting all members of a firm or corporation to pursue the business when only one member or the manager has procured such license, is unconstitutional and void, as not operating equally upon all of a class pursuing the same business under similar circumstances. (State v. Gardner, 785.)

7. CONSTITUTIONAL LAW—PEDDLERS.—A statute which permits a manufacturer, farmer, or nurseryman to peddle his wares, either by himself, or his employé, without a license, but which prohibits a purchaser from such manufacturer, farmer or nurseryman from peddling the goods purchased on his own account, without a license, makes an improper classification and an arbitrary distinction, and is unconstitutional and void. (State v. Wagener, 565.)

8. STATUTE—REPEAL OF—EFFECT ON RESTORING A COMMON-LAW RULE OR REMEDY.—Where a statute or rule of

common law is repealed or modified, and the repealing or modifying act is afterward expressly or impliedly repealed by an act which manifests no intention that the statute or common-law rule repealed or modified shall continue repealed or modified, the repeal of the repealing or modifying act revives the act or common-law rule so repealed or modified. (Baum v. Thoms, 368.)

See Eminent Domain, 1; Interstate Commerce; Police Power.

STREETS.

See Dedication; Ejectment, 1; Highways, 1-4; Municipal Corporations, 5-7, 19-21, 23.

SUBROGATION.

GARNISHMENT—SUBROGATION BY REASON OF.—One who obtains judgment against a ward and garnishes his guardian becomes subrogated to the claims of the ward against the guardian to the amount of such judgment. (Hazelton v. Douglas, 122.)

SUCCESSION TAX.

See Statutes, 1; Taxes, 8-11.

SURETYSHIP.

1. SURETYSHIP—RELEASE.—The maker of a note is not entitled to credit thereon of a sum paid to the payee by a surety on the note in consideration of his release as such surety. (Gilstrap v. Smith, 290.)

2. SURETYSHIP.—HOLDER OF NOTES MAY COMPOUND WITH THE SURETY thereon without releasing the principal. (Gilstrap v. Smith, 290.)

See Contracts, 18; Judgment, 32; Limitations of Actions, 3, 4.

SURFACE WATERS.

See Municipal Corporations, 24-25.

TAXES.

1. TAXES—POWER OF STATE TO LEVY.—A state has an unquestionable right to tax all subjects within its jurisdiction, and this right may, in the discretion of the legislature, be exercised over all property coming temporarily within the state, whether for trade, business or convenience, unless such exercise of power conflicts with some constitutional limitation. (Hall v. American Refrigerator etc. Co., 223.)

2. TAXES—PERSONAL PROPERTY.—Personal property may, for the purpose of taxation, be separated from its owner, and he may be taxed, on its account, wherever it is, though it may not be at the place of his domicile. (Hall v. American Refrigerator etc. Co., 223.)

3. A TAX CAN BE LEVIED FOR A PUBLIC PURPOSE ONLY, and never for private objects or purposes. (State v. Switzler, 653.)

4. TAXES—WHEN DEEMED TO BE FOR A PUBLIC PURPOSE—USAGE.—In deciding whether a tax has been levied for a public purpose, courts must be governed mainly by the course and usage of the government, the objects for which taxes have been customarily and by long course of legislation levied, as distinguished from objects which, by like usage, are left to private inclination, interest, or liberality. (State v. Switzler, 653.)

5. TAXES TO PROVIDE FOR FREE SCHOLARSHIPS.—A statute imposing a succession tax and providing that the proceeds

thereof shall be appropriated for establishing and maintaining free scholarships in the state university, that the persons admitted to such scholarship shall pass a written examination, and be dependent upon their own exertions, and financially unable to obtain their education, and that there shall be paid to them in monthly installments while attending the university the sum provided by the scholarship for defraying expenses of attendance, provides for a tax for a private purpose, and is therefore unconstitutional and void. (State v. Switzler, 653.)

6. **TAXES—INTERSTATE COMMERCE—TAXATION OF INSTRUMENTALITIES.**—A state cannot interfere with interstate commerce by the imposition of a tax for the privilege of transacting such commerce, but it does have a right to tax, at their full value, all the instrumentalities, within the state, used for such commerce. (Hall v. American Refrigerator etc. Co., 223.)

7. **TAXES—INTERSTATE COMMERCE—REFRIGERATOR-CARS—TAXATION OF.**—Refrigerator-cars, used for the transportation of perishable freight, from time to time, within a state, by a railroad company, which hires the cars from a foreign corporation, and pays for their use according to mileage, in the same way that railroad companies hire and pay for freight-cars on connecting lines of railroad, may be lawfully taxed by the state, though such cars are used for interstate commerce, and the assessment may be based upon the average number of such cars in use, during the year, in the state. (Hall v. American Refrigerator etc. Co., 223.)

8. **A SUCCESSION TAX—WHAT IS NOT.**—A tax levied on the whole estate of a decedent is not a succession tax, but a tax directly upon property, and to be sustainable, must be uniform. (State v. Switzler, 653.)

9. **A SUCCESSION TAX IS AN EXCISE OR DUTY UPON** the right of a person or corporation to receive property by devise or inheritance from another. It is a burden on each person claiming succession, measured by the value of his interest and collectible out of his interest only. (State v. Switzler, 653.)

10. **A SUCCESSION OR COLLATERAL INHERITANCE TAX** is subject to the rule that taxes can be levied only for a public purpose. (State v. Switzler, 653.)

11. **A SUCCESSION TAX MUST BE UNIFORM** as to persons of the same class. One person cannot be charged a greater percentage on his legacy than another person in the same class, because the amount of his legacy is greater than that of the latter. A statute imposing a charge of five per cent for legacies of ten thousand dollars, and where legacies are above that sum, five per cent on the first ten thousand dollars, and twelve and a half per cent on the balance, is therefore void for want of uniformity. (State v. Switzler, 653.)

12. **TAXES—EXCESSIVE LEVY AND SALE FOR.**—An excessive levy of an execution on land and the sale thereof for the nonpayment of taxes is void at the option of the owner. (Williamson v. White, 302.)

See Ejectment, 5; Executions, 9; Mortgage, 8, 4.

TELEGRAM.

See Libel, 2, 8.

TELEPHONE COMPANIES.

A TELEPHONE SYSTEM MAY BE OWNED AND CONDUCTED by an individual as well as by a corporation or association. (Magee v. Overshiner, 358.)

See Highways, 2.

TIME.

See Trusts, 14.

TORTS.

See Actions, 2; Evidence, 6.

TOWN PLAT.

See Highways, 8.

TRIAL.

1. **TRIAL—DISCRETION IN REOPENING CASE.**—The question of reopening a case at any stage of the proceedings, to let in additional testimony, is largely in the discretion of the trial court, which cannot be reviewed on appeal unless a gross abuse of such discretion is shown. (Powell v. State, 277.)

2. **TRIAL—DISCRETION OF COURT.**—On a trial for murder, the court may properly inquire whether the pistol with which the homicide is alleged to have been committed has been formally offered in evidence or not, in order to satisfy his own mind on that point. (Kearney v. State, 344.)

3. **WITNESSES—RIGHT OF COURT TO CAUTION.**—It is proper for the trial judge, when he observes that a witness is embarrassed or hesitates while testifying, to caution him not to become excited and to think over what he is about to say. (Kearney v. State, 344.)

4. **TRIAL—PRESENCE OF OFFICIAL REPORTER.**—The trial court need not require the official reporter to remain in attendance until the termination of the trial in order that, in case of disputes between counsel as to what the evidence is, a party may not be "deprived of the privilege of referring to the official report of the case to refresh the recollection of the jury." (Kearney v. State, 344.)

5. **TRIAL—IMPROPER CONDUCT OF COUNSEL—WAIVER.** If on a criminal trial the prosecuting attorney makes an improper statement unknown to the trial judge, or indulges in improper argument promptly stopped by such judge of his own motion, and no ruling on such conduct is requested on the part of the accused at any time, it is too late after verdict to urge such conduct as ground for a new trial. (Kearney v. State, 344.)

TRUSTS.

1. **CY PRES.**—The doctrine of cy pres as it existed in England and has been applied in some of the states of the American Union, whereby trust provisions are administered and executed as near to the presumed intention of the founder as may be, is not recognized as a part of the judicial power in the state of Wisconsin. (McHugh v. McCole, 106.)

2. **TRUSTS—WHEN NOT SUSTAINABLE.**—To constitute a valid testamentary trust there must be a definite beneficiary, either named or capable of being ascertained within the rules of law applicable to such cases. The absence of a definite beneficiary is, as a general rule, a fatal objection to any attempt to create a valid trust. (McHugh v. McCole, 106.)

3. **A TRUST NOT CAPABLE OF ENFORCEMENT BY A COURT** cannot be sustained on the ground that the trustee has accepted it and will carry it out according to what he understands to be the wishes of the donor. (McHugh v. McCole, 106.)

4. **TRUST—BEQUEST FOR MASSES, WHEN CREATES.**—A bequest of a sum specified to a Roman Catholic bishop of the diocese of G., to be used and applied for masses for the repose of the soul of the testator and the souls of other deceased persons designated in the will, is not a bequest to the bishop to have and enjoy as he may deem best, but an attempt to create a trust. (McHugh v. McCole, 106.)

5. **TRUST FOR MASSES.**—A bequest of a sum of money to the Roman Catholic bishop of the diocese of G., to be used by him for masses for the repose of the souls of designated persons in the several sums in the will specified, is void for want of beneficiaries who may come into equity and enforce its performance. (McHugh v. McCole, 106.)

6. **TRUSTS—WHEN TESTAMENTARY AND THEREFORE REVOCABLE.**—A deed conveying property to be held in trust to pay the grantor during life the income and to sell and invest as he may direct, and after his death, to convey to such of his sons as may be living and to the issue of such as have died, is revocable by the grantor, because it is testamentary in character. Especially is this true when the grantor is a woman, and her attention is not called to the fact that the deed contained no clause of revocation, nor to the desirability of inserting such a clause. (Chestnut St. Nat. Bank v. Fidelity Ins. etc. Co., 860.)

7. **SPENDTHRIFT TRUSTS.**—A provision in a deed of trust in favor of the donor's children that the share of one of them shall be held in trust for his use and benefit, and that neither the income nor the principal shall under any circumstances be subject to anticipation or assignment by him, or to seizure or attachment under any judgment, decree, or other lawful process at the suit of any creditor he has or may have, is valid, and no part may be taken under a writ in favor of his creditors. (Chestnut St. Nat. Bank v. Fidelity Ins. etc. Co., 860.)

8. **EVIDENCE—INGRAFTING TRUST ON WILL BY PAROL.**—The very purpose of requiring wills to be in writing would be wholly defeated if courts of equity were allowed to ingraft upon their provisions such parol trusts as seemed probably to have existed in the mind of the testator. (Moran v. Moran, 443.)

9. **EVIDENCE—INGRAFTING TRUST ON WILL BY PAROL.**—Under a statutory provision which makes a writing essential to the validity of a will, parol evidence is not admissible to show that a testator, in making an absolute devise, intended that the devisee should hold the property in trust for others, although the devisee, by a pleading in probate proceedings, acknowledges the trust in writing and defines its extent. (Moran v. Moran, 443.)

10. **CONVEYANCES—WHEN TWO MAY BE REGARDED AS ONE.**—If a trust deed is executed, and afterward a further deed is made modifying and changing some of the terms of the former, the two should thereafter be regarded as one instrument, and a clause of the donor's will confirming the first should not be construed as revoking the second, but as confirming the first as modified by the second. (Chestnut St. Nat. Bank v. Fidelity Ins. etc. Co., 860.)

11. **TRUSTS—CONVERSION BY TRUSTEE—LIABILITY.**—In order to subject a private estate of a defaulting trustee to the payment of a trust fund, such as the proceeds of stock sold on commission, which have been by him wrongfully converted, it is not necessary to trace such fund into any particular property, but it must be clearly shown that it went into, and was used for the benefit of such estate. (Hopkins v. Burr, 238.)

12. **TRUSTEE'S SALE—"HIGHEST AND BEST" BIDDER—WHO IS.**—A requirement in a trust deed that, if a sale is made by

the trustee, he must sell for the "highest and best" price, does not mean that no sale is legal unless there are three or more bids. Hence, if the deed expressly provides that the owner of a note secured thereby may become the purchaser at such a sale, and he is the only one who bids, his offer is the "highest and best" bid within the meaning of such requirement. (Lathrop v. Tracy, 229.)

13. TRUSTEE'S SALE—COMPETITION.—If a full and fair opportunity is given to bidders, at a trustee's sale, to participate therein, and there is no collusion, the requirement as to competition is fulfilled. (Lathrop v. Tracy, 229.)

14. TRUSTEE'S SALE—TIME—FRACTIONS OF AN HOUR.—The law does not recognize fractions of an hour. Hence, if a trustee gives notice that he will make a sale at ten o'clock, he is not required to sell precisely at that hour, but may sell at any time during the hour, and a sale at half past ten o'clock is not a departure from the notice. (Lathrop v. Tracy, 229.)

15. TRUSTEE'S SALE—INADEQUACY OF PRICE.—A trustee's sale, properly conducted, cannot be set aside on the ground of mere inadequacy of price. (Lathrop v. Tracy, 229.)

16. TRUSTEE'S SALE—INADEQUACY OF PRICE.—A foreclosure sale, made by a trustee, will not be set aside merely because it results in loss to the owner of an equity in the property. It is unfortunate for him that, on account of the stringency of the times, he should lose his equity because the property does not bring its full value, but this is no reason why a court should give him a further opportunity to protect himself, when he does not even claim that another sale would enable him to do so. (Lathrop v. Tracy, 229.)

See Charities; Contracts, 18; Liens, 1.

ULTRA VIRES.

See Corporations, 3-5, 8.

USURY.

1. USURY—REMEDY OF ONE WHO HAS SUBMITTED TO.—A borrower who has paid more than legal interest is not restricted to the remedy given by statute, but may maintain an action of assumpsit to recover the excess of interest paid on paying, or offering to pay, the money loaned with legal interest. (Baum v. Thoms, 368.)

2. USURY—PAYMENT OF IS NOT DEEMED VOLUNTARY.—A payment of usurious interest is regarded as made under the constraint of a formal, though illegal, contract, obtained by taking advantage of the necessities of the borrower, and is, therefore, excepted from the ordinary rule that one voluntarily paying money on an illegal scheme cannot maintain an action to recover such payment. (Baum v. Thoms, 368.)

VARIANCE.

See Mayhem, 4.

VENDOR AND PURCHASER.

1. VENDOR AND PURCHASER—ASSUMPTION OF A DEBT DUE A THIRD PERSON.—If a grantee in a conveyance to him assumes and agrees to pay the debt of a third person as part of the consideration for his purchase, he thereby becomes liable to such third person although his grantor is not liable for the debt and no consideration passes to the grantee from either of the other parties. The liability rests solely on the promise. (Enos v. Sanger, 38.)

2. VENDOR AND PURCHASER—WHO IS NOT A BONA FIDE PURCHASER—INADEQUATE CONSIDERATION.—If a wife is conversant with the terms of an oral agreement, whereby her husband attempts to obtain land for an inadequate consideration, a conveyance of the land to her will be deemed an act in furtherance of such attempt, and she cannot, therefore, be regarded as an innocent purchaser for value. (*Williams v. Hamilton*, 475.)

See Assignment, 2.

WAIVER.

See Insurance, 7-11, 52.

WAREHOUSEMEN.

1. A WAREHOUSEMAN is one who carries on the business of receiving and keeping goods in storage for compensation. Hence one cannot be a warehouseman of his own goods. (*Tradesmen's Nat. Bank v. Kent Mfg. Co.*, 876.)

2. WAREHOUSEMAN—WHO IS NOT.—Though one professes to be a warehouseman and issues warehouse receipts, yet, if he is in fact the clerk of another, by whom the rent of the warehouse is paid, and the warehouse receipts are issued to his employers, who pay no storage, and are the only persons having property in such warehouse, he is not a warehouseman, and receipts issued by him on the property of his employers have not the legal attributes of warehouse receipts. (*Tradesmen's Nat. Bank v. Kent Mfg. Co.*, 876.)

3. WAREHOUSE RECEIPTS—WANT OF NOTICE OF CHARACTER OF.—If a person professing to issue warehouse receipts is not a warehouseman in fact, but merely assumes to be such warehouseman for the purpose of issuing warehouse receipts for his employers on their own property in his charge, want of notice of these facts will not protect a person dealing in such receipts by taking an assignment not accompanied by an actual delivery of the property. (*Tradesmen's Nat. Bank v. Kent Mfg. Co.*, 876.)

WATERS.

1. WATERS AND WATER COURSES — PRESCRIPTIVE RIGHTS.—The artificial state or condition of flowing water founded upon prescription becomes a substitute for the natural condition previously existing; and from it arises a right on the part of those interested to have the new condition maintained. (*Smith v. Youmans*, 80.)

2. RIPARIAN RIGHTS—RIGHT TO ABANDON EASEMENT.—An owner may abandon his water rights and easement to maintain a lake at an artificial level, so as to escape all liability at law, for consequential damages to riparian owners around the lake, unless he is bound by law or agreement to maintain the higher level of the waters of the lake. (*Smith v. Youmans*, 30.)

3. RIPARIAN RIGHTS—DAM RAISING WATER IN LAKE, LOSS OF RIGHT TO REMOVE.—The owners on the shore of a lake kept above the natural level by means of a dam until the owner thereof has acquired a prescriptive right to maintain it, and until the lands of such owners have become valuable as summer resorts by reason thereof, while they have made valuable improvements relying on the continued maintenance of the dam, have an easement on their part, and may prevent the owner of the dam from lowering the level of the lake to their injury. (*Smith v. Youmans*, 30.)

4. RIPARIAN PROPRIETORS—RIGHT TO CONSTRUCT WHARVES AND PIERS.—Owners of land in a city between a street

and the shore of a lake have the right to construct in front of their respective lots, in shoal water, proper wharves, piers, and booms in aid of navigation, without obstructing it, far enough to reach water navigable for such boats as are in use or appropriate to the lake. (*Madison v. Mayers*, 127.)

See Landlord and Tenant; Municipal Corporations, 24, 25.

WILLS.

1. **WILLS—ATTESTING WITNESS.—THE WIFE OF AN EXECUTOR** of a will is a competent attesting witness thereto. (*In re Will of Lyon*, 52.)

2. **WILLS—STATUTE OF FRAUDS.**—It is a matter of serious doubt whether the statute of frauds was ever intended to apply to testamentary dispositions of property. (*Moran v. Moran*, 443.)

3. **WILLS—CONSTRUCTION—INTENT MUST CONTROL.**—In construing wills, the intention of the testator, when ascertained, and not in violation of law, must control. (*Westcott v. Binford*, 530.)

4. **WILLS—CONSTRUCTION OF—RULE IN SHELLEY'S CASE CANNOT OVERRIDE.**—There is a material distinction between wills and deeds in the application of the rule in Shelley's case, and that rule, even if it is in force, will not be allowed to override the manifest and clearly expressed intention of the testator, but such intention will always be carried into effect if it can be ascertained. (*Westcott v. Binford*, 530.)

5. **CONVERSION OF REALTY INTO PERSONALTY.**—A power of sale, however peremptory in form, does not operate as a conversion in the aid of any particular purpose of the testator, where the plan or purpose fails by reason of illegality, lapse, or other cause. In such a case, the property retains its original character and goes to the heir or next of kin as real or personal estate, as the case may be. (*McHugh v. McCole*, 106.)

6. **WILLS—MARRIAGE—REVOCATION BY.**—The marriage of a woman does not revoke her will, if her common-law disabilities in respect to the disposition of her property have been removed by statute. (*In re Will of Lyon*, 52.)

See Appeal, 9.

WITNESSES.

1. **WITNESSES.—THE WIFE OF AN INSANE HUSBAND** cannot testify for him, if the statute declares that a wife cannot testify for or against her husband without his consent. Being insane, he cannot grant such consent. (*Falk v. Wittram*, 184.)

2. **WITNESSES—MATTER OF OPINION—COMPETENCY—DETERMINATION OF.**—Whether a witness, called to testify to any matter of opinion, has such qualifications and knowledge as to make his testimony admissible is a preliminary question for the judge presiding at the trial, but his decision is not conclusive, if it is clearly shown to be erroneous in matter of law. (*Germania Life Ins. Co. v. Lewin*, 215.)

3. **EXPERT EVIDENCE IS NOT ADMISSIBLE TO PROVE** what was the cause of an explosion of the water glass of a boiler, when the question before the jury is whether or not a valve was opened, or, if opened, whether such opening was sudden. Expert evidence may properly be received as to what would have been the effect of opening such valve suddenly, but experts should not be permitted to decide a question of fact, and any question asked an expert must be so framed as not to require him to pass on the credibility of any other evidence in the cause. (*Maitland v. Gilbert Paper Co.*, 137.)

4. **WITNESSES—EXPERTS—COMPETENCY OF, IN CASES OF POISONING BY CYANIDE OF POTASSIUM.**—If a medical witness is called, as an expert, to prove, among other things, the symptoms attending a case of poisoning by cyanide of potassium, he is competent to testify, after a foundation is laid, showing that he is a regularly licensed physician, of extensive practice and experience, and has made a special study, for many years, of toxicology, although he may have had no actual experience with cases of poisoning with that particular drug. (*Germania Life Ins. Co. v. Lewin*, 215.)

5. **WITNESSES—IMPEACHMENT.**—If a witness has been impeached, it is the duty of the jury to disregard his testimony, unless it is corroborated in material particulars. (*Powell v. State*, 277.)

6. **WITNESSES—IMPEACHMENT.**—If the credibility of a witness is attacked by an effort to impeach him by legal methods, the jury become the triers of the credibility of the witness sought to be impeached, and of the witnesses by whose testimony the attack is made. They are to weigh the opposing testimony, and at last say whether or not in their judgment the witness has been impeached. (*Powell v. State*, 277.)

See Trial, 8.

WOMAN'S RIGHTS.

See Officers, 2.

WRITS.

1. **A WRIT OF ASSISTANCE WILL NOT BE ISSUED** where there is a bona fide contest as to the right to the possession of land under a sale, or where the rights of the parties have not been adjudicated in the principal suit. (*Roach v. Clark*, 353.)

2. **THE ISSUING OF A WRIT OF ASSISTANCE** is within the discretion of the court, but can be justified only when the right is clear, and there is no equity or appearance of equity in the defendant, and when the sale and proceedings under the decree are beyond suspicion. (*Roach v. Clark*, 353.)

See Appeal, 16.

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